THE ALEXANDRIAN HALAKAH IN APOLOGETIC LITERATURE OF THE FIRST CENTURY C. E.

By SAMUEL BELKIN

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To my Teachers

PROFESSOR M. BURROWS

AND

PROFESSOR H. A. WOLFSON

PREFACE

An apology is in order when one is writing on the Halakah in apologetic literature. For the term "apologetic" carries with it the idea of exaggeration, and the legal material found in such sources can hardly be called Halakah, a term associated with the formulation of law for actual usage. None the less I believe that the principles involved in the laws found in the apologetic sources must have their origin in an established form of jurisprudence. Thus my purpose in this paper is not to enter into the application or reality of the legal material of the apologetic sources of the first century C. E., such as Josephus' *Contra Apionem* and Philo's *Hypothetica*, but merely to investigate the origin of the legal principles. I shall also try to explain many contradictions in the works of Philo and Josephus and also endeavor to give an answer to the old question whether or not the entire work of Josephus is based on one source or various sources.

The discussion and conclusion in this paper is an outgrowth of a much longer work on the relation of Philo to the Oral Law, submitted in 1934 at Brown University as a partial fulfillment of the degree of Doctor of Philosophy. In my work, considerably extended during the last two years, I deal with the gradual development of the Halakah in Palestine and the relation of the Alexandrian jurisprudence to the Palestinian Law. In the course of my research I found in the works of Philo and Josephus many laws which are apologetic in character; but these neither harmonize with the same laws discussed by the former in *De Specialibus Legibus* and other treatises, nor with the identical laws discussed by the latteer in the *Antiquities*. I have,

therefore, decided to treat the Halakah in the apologetic material separately and to publish it as an introductory work to my volume on the relation of Philo to the Oral Law, which will appear in print in the near future.

My references to the Hypothetica are from Eusibius, *Praep. Evang.*, VIII, VII. The references to Josephus are from Niese, *Edito Minor.* I do not follow a standard translation, although I use Thackeray's translation of *Contra Apionem* frequently. I follow the original text as carefully as possible. My references to Roman law are based on authentic sources.

I also wish to thank my friend Rabbi W. Braude who read the proofs and made a number of corrections.

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THE ALEXANDRIAN HALAKAH IN APOLOGETIC LITERATURE OF THE FIRST CENTURY C. E.

THE works of Philo and Josephus are the non-rabbinical and non-Christian sources which help us to understand the history of Judaism in the first century C. E. Both were brought up in a different atmosphere, but both alike endeavored to give a comprehensive view of Judaism. Philo does not claim that he was thoroughly versed in Jewish traditions. He tells us of his education in grammar, philosophy, geometry, music and poetry,[1] but is silent about his Jewish training. He refers in many places to the fact that Jewish children are brought up from the time of their infancy in Jewish customs and laws, but he never mentions his own accomplishments nor does he claim to be superior to others. Josephus, on the other hand, says in his autobiography that while he was still a young man he acquired an unusual reputation for knowledge in legal matters. He came in contact with the Pharisees, Sadducees and Essenes, and finally became a follower of the Pharisaic sect. He was also a member of an outstanding priestly family.[2] In short, Josephus claims to be not merely an historian but an extraordinarily competent scholar in Jewish law and customs. It is striking to notice, however, that though Philo does not claim to be a lawyer his work reveals not only a man of "geometry and music" but one thoroughly acquainted with the legal field,[3] while Josephus' accounts

[1] *De Congressu Erud.*, 72–75.
[2] *Vita*, 1 and 2.
[3] See Goodenough, *Jewish Courts in Egypt*, pp. 1–29.

of Jewish religion and law are disappointing. Moore has accurately stated that while we can get a conception of Jewish theology in Alexandria through reading the works of Philo, we would know very little about Palestinian Judaism if we were entirely dependent on Josephus.[4] Josephus speaks about Jewish laws and traditions in many places but when he tries to discuss the laws themselves he shows that he was not well acquainted with them. We may assume that Josephus, who belonged to the aristocratic priesthood, had a very limited knowledge of Jewish theology and law.

Some scholars[5] have endeavored to prove that the paraphrase of the Jewish polity in the *Antiquities* was taken by Josephus from some Alexandrian predecessor, such as Philo, and it is true that several passages of the *Antiquities* have parallels in Philo. Josephus, for instance, writes: "Let no one blaspheme the recognized gods of other states, nor plunder strange temples, nor take a treasure dedicated to any god."[6] The same law is found also in Philo,[7] and Weyl suggested that Josephus had taken it directly from Philo. There is no doubt that Philo and Josephus had the same motive in mind for writing this law, but it by no means proves the dependency of Josephus on Philo. Neither Philo nor Josephus considered the blaspheming of idols as a biblical prohibition, but life among pagans in the Diaspora made the formulation of such a law imperative for the safety of the Jewish communities.[8] I am inclined to think that when Josephus wrote the *Antiquities* he was not acquainted with the work of Philo at all. The similarity

[4] *Judaism*, I, 210–211.

[5] See the comparative study of Josephus and Philo by Weyl, *Die iüdische Strafgesetze bei Flavius Josephus*; Ritter, *Philo und die Halacha.*

[6] *Ant.*, IV, 8, 10.

[7] *Spec. Leg.*, I, 53.

[8] See Goodenough, *Jewish Courts in Egypt*, p. 48.

of thought between the *Antiquities* and Philo is very limited and there is no reason to believe that Josephus took *De Specialibus Legibus* as a source for his survey of the Jewish constitution.

Furthermore, the exposition in the *Antiquities* of the legal and ethical principles underlying the Jewish constitution must be carefully distinguished from the same exposition found in *Contra Apionem*, II. The former was written in order to acquaint the gentile world with the antiquity of the Jews and their institutions; the latter was written primarily to refute a false accusation against the whole system of Jewish ethics and religion of the Alexandrian community. Apion was not the first to spread the vilest reports concerning the origin and character of Judaism and especially of the Jewish community in Alexandria. Apollonius Molo, Posidonius of Apamea, Caeremon, and Lysimachus preceded Apion in their slanders against the Mosaic Law and the religion of the Jews. Apion was active in his anti-Jewish campaign even during Philo's life. When Philo was sent to Rome as one of the Jewish representatives in order to protest to Caligula against the wrongs they suffered under Flaccus, Apion was dispatched as an advocate for the anti-Jewish group and succeeded in defeating the object of the Jewish embassy. There is no doubt that Philo and the Alexandrian Jews in general did not remain silent after hearing the false accusation against their constitution. Such defensive arguments must have been current in Alexandria at an earlier date than when Josephus wrote *Contra Apionem*, II, and we may say almost with certainty that the Jews met the accusation which was brought by Apion against their constitution by showing its ethical value.

It is necessary to bear in mind that Philo, like Josephus, gives us two surveys of Jewish law and ethics. One account

in *De Specialibus Legibus* reveals to us Philo the practical lawyer and this work may be taken as a complete manual of Alexandrian law and ethics. The other survey occurs in the *Hypothetica*, where the discussion of the law no longer shows Philo as a lawyer but as a defender and apologist of Jewish law against the reproaches leveled against it by Apion and his predecessors.[9] When we compare *De Specialibus Legibus* and the *Fragment* of Philo with the *Antiquities* and *Contra Apionem*, II, of Josephus, we notice the following peculiarities:

a) The law in the *Fragment* contradicts some of the laws in *De Specialibus Legibus*.
b) *Contra Apionem*, II, contradicts some of the laws of the *Antiquities*.
c) In the *Fragment* of Philo and *Contra Apionem* of Josephus the violation of any of the commandments is a capital offense.
d) Many laws of Josephus in *Contra Apionem*, II, which have no basis in rabbinic literature, can easily be traced in the *Fragment* and *De Specialibus Legibus* of Philo.

In order to illustrate our point clearly a thorough comparative study of the works of Philo and Josephus is essential. From this analysis we may ascertain whether the survey of Jewish ethics in *Contra Apionem*, II, is based upon an Alexandrian source, such as the work of Philo, or whether it is based upon Palestinian sources. The conclusion reached will solve not only the problem whether the entire

[9] There are two works of Philo concerning which we have information only through quotations in Eusebius. The ὑποθετικὰ περὶ Ἰουδαίων or ἀπολογία ὑπὲρ Ἰουδαίων were of an apologetic character, in which Philo refutes the erroneous opinions of the slanderers of the Jewish race and constitution. In order to show the value of Jewish ethics Philo gives an abstract of Jewish law. Eusebius did not preserve for us the whole *Hypothetica*. He quotes Philo only in so far as the material of the *Hypothetica* comes in well in his discourse.

work of Josephus is dependent upon one Palestinian source or upon various other sources, but also solve many contradictions in Josephus himself. Furthermore, we shall have a basis for deciding whether Alexandrian Jewish ethics differed in many respects from Palestinian ethics.

TREATMENT OF ANIMALS

Josephus endeavors to prove the high ideals of Jewish ethics on the ground that the law shows mercy not only to human beings but also to animals: "So thorough a lesson he has given us in gentleness and humanity that he does not overlook even the brute beast, authorizing their use only in accordance with the law and forbidding all other employment of them. Creatures which take refuge in our houses like suppliants we are forbidden to kill. (ἃ δ' ὥσπερ ἱκετεύοντα προσφεύγει ταῖς ὀικίαις απεῖπεν ἀνελεῖν). He would not suffer us to take the parents with their young and bade us even in an enemy's country to spare and not to kill the beasts in labor.[10] With us maltreatment even of a brute beast is a capital offense."[11] In this passage Josephus makes reference to laws which have support neither in rabbinic literature nor in the Bible. First, animals which take refuge in one's house must be taken care of; second, maltreatment of animals is a capital offense; third, it seems that Josephus has certain laws in mind which deal with the treatment of animals. Such prohibitions are mentioned neither in the *Antiquities*[12] nor in Philo's *De Specialibus Legibus*. In addition to the biblical law that one must not strip a nest wholly of its young, Josephus undoubtedly makes reference here to a non-Palestinian source. Maltreatment of animals was forbidden by the Rabbis also,

[10] *Contra Apionem*, 29 (213).
[11] *Contra Apionem*, 37 (271).
[12] See *Ant.*, IV, 8, 30.

but it was not considered a capital offense nor a biblical prohibition.[13] The law referred to by Josephus, that one must shelter animals which flee to his house for refuge, has no parallel at all in Palestinian literature. The question naturally arises, on what source did Josephus base the laws about animals? The only answer we can give is that Josephus was acquainted with the *Hypothetica* of Philo which explicitly mentions these laws. Philo writes: "There are other commandments of apparently a trivial and ordinary kind. It is not lawful, says the lawgiver, to strip a nest wholly of its young; it is not lawful to kill the suppliant animals which flee to you for refuge (μὴ ζώων ἱκεσίαν οἷά ἐστι ὅτε προσφυγόντων ἀναιρεῖν). You may say, perhaps, that these things are of no consequence whatever, but still at least the law which speaks about these particulars is of importance, and deserving all imaginable care and attention and the declarations are important and so are the curses which threaten those who violate these laws with destruction; and God looks over all such matters and He is the avenger and punishes on every occasion and every place. No one shall treat animals, in any respect, in a manner contrary to the injunctions imposed."[14] The law referred to by Philo, that animals which flee for refuge must not be rejected, may represent an Alexandrian symbolical interpretation of Deut. 23.15–16 which forbids refusing shelter to a slave who flees to one's house as a suppliant. In the ancient world the terms animal and slave were used practically as synonyms. Certain Greek lawyers who made a comparison between their own laws and the Law of Moses

[13] Even according to the rabbinic scholars B. M. 32b, while maltreatment of animals is biblically prohibited it is not a capital offense and is applied only to overburdening the beast. It has nothing to do with the passage in Josephus under consideration.

[14] *Fragmenta*, 580. The *Frag.* which will appear in this paper is from *Eusebius, Praepart. Evang.*, VIII, in the Lipsiae ed.

found fault with the Mosaic law, and the arguments of the Alexandrian Jews against these critics would be somewhat as follows: You Greek lawyers claim that your law has a more ethical and moral basis than ours. You are wrong, for while your law treats a slave like a brute beast, we Jews extend our mercy even to animals and consider the maltreatment of beasts a capital offense; our law commands us to shelter even beasts. How much more are we supposed to extend these laws to all human beings?

ABORTION

As we have mentioned before, one of the striking points in *Contra Apionem*, II, is that the violation of most of the commandments is a capital offense, *Ζημία γὰρ ἐπὶ τοῖς πλείστοις τῶν παραβαινόντων ὁ θάνατος.*[15] One of the laws which Josephus considers a capital offense is abortion. He writes: "The law orders all offspring to be brought up and forbids women either to cause abortion or make away with the foetus; a woman convicted of this is considered a murderess, because she destroys a living creature and diminishes the race."[15a] Josephus endeavors to show in this passage the moral justification of the Jewish law which considers the killing of the foetus in its mother's womb as murder. Weyl[16] and Frankel[17] understand Josephus' words to imply legal prosecution and punishment for abortion. Aptowitzer thinks, however, that "the matter under consideration is only of moral valuation."[18] The fact that Josephus says that death is the penalty for most of the prohibitions which he enumerates indicates that Josephus has in mind the civil court. The general view in

[15] *Contra Apionem*, 30 (215).
[15a] *Contra Opionem*, 24 (202).
[16] *Die jüdische Strafgesetze bei Flavius Josephus*, pp. 50–52.
[17] *Monatsschrift*, I, 132.
[18] "Jewish Criminal Law," *JQR*, XV (1924–25), p. 115 and n. 191.

tannaitic literature is that abortion is not a capital offense and if one strikes a pregnant woman so that a miscarriage results, he has to pay a fine to the husband of the woman.[19] This law is based upon the Hebrew text of Ex. 21.22, according to which striking a pregnant woman can be classed as murder only if such an act produced a fatal effect on the mother of the child, "But if any harm follows then, thou shalt give life for life." The Septuagint, on the other hand, translates Ex. 21.22, as follows: "If two men wrestle with one another and hit a pregnant woman, and the child comes forth and is not formed yet, then the penalty shall be a money penalty . . . But if it was formed, then thou shalt give life for life." Philo also follows the Septuagint and considers a formed foetus a human being, so that whoever kills such a foetus is a murderer.[20] The controversy itself whether the foetus is considered a Ζῶον is also found in Greek literature. The Stoics held the foetus as a part of the mother as long as it was in the mother's womb,[21] while Plato maintains: "The foetus is a living being, for it moves about in the womb and draws nourishment to itself."[22] Josephus in the *Antiquities* follows the Palestinian instead of the Alexandrian tradition for he says: "He that kicks a woman with child, so that the woman miscarries, let him pay a fine in money, as the judge shall determine, as having diminished the multitude by the destruction of what was in her womb; and let money also be given to the woman's husband by him that kicked her."[23] Hence we

[19] *Mekilta Mishpatim* on Ex. 21.22; see also Ritter, *Philo und die Halacha*, pp. 34–39.

[20] *Spec. Leg.*, III, 108–109.

[21] See Heinemann, *Philons jüdische und greichische Bildung*, pp. 390–391; Goodenough, *Jewish Courts in Egypt*, pp. 112–113.

[22] Plutarch, *De Placitis Philosophorum*, V, 15, πλάτων ζῶον τὸ ἔμβρουν καὶ γὰρ κινεῖσθαι ἐν γαστρὶ καὶ τρέφεσθαι; see also Aptowitzer, "Jewish Criminal Law," *JQR*, XV (1924–25), p. 115 and n. 191.

[23] *Ant.*, IV, 8, 23.

see a definite contradiction between the *Antiquities* and *Contra Apionem*, II. Furthermore, Josephus' view in *Contra Apionem* is not even in agreement with the Alexandrian usage, for according to Philo in *De Specialibus Legibus* only a formed foetus has the status of a human being, but not an unformed foetus. It is, however, interesting to note that in the *Hypothetica* where Philo speaks about the violation of the commandments which he, like Josephus, enumerates as capital offenses, he also includes the prohibition of abortion. "No one shall cause the offspring of a woman to be abortive by means of miscarriage, or by any other contrivance."[24] After Philo finishes enumerating these prohibitions he also speaks about minor offenses of less solemn character whose punishment is destruction by God. It seems definite that in the *Hypothetica* which was written especially against the slanderers of the Jewish law, Philo considers abortion of any kind as a capital offense. Hence we have only an Alexandrian source for Josephus' statement in *Contra Apionem*, II, that abortion is a capital offense.

THEFT

Theft according to biblical law is not a capital offense. If the thief is found he has to pay double the amount of the thing he has stolen.[25] In rabbinic literature a distinction is made between the Hebrew terms גנבה and גזלה. The term גנבה is applied to things stolen secretly and the term גזלה to robbery by force.[26] Büchler pointed out that in the Bible גזל only means the misappropriation of another man's goods, though it might be legally obtained.[27] Whenever property has been acquired by illegitimate means it

[24] *Fragmenta*, 580.
[25] Ex. 22.4. [26] B. Ḳ. 67b.
[27] *Sin and Atonement*, pp. 375–385.

is called, in biblical language, "robbery." The Rabbis, however, not only made a distinction between the Hebrew terms גנבה and גזלה but also applied different laws to these two sorts of stealing. In case of secret theft the biblical penalty of paying double the amount of the thing stolen was applied. In case of open robbery the Rabbis did not prescribe any penalty except the restitution of the thing robbed. Morally, however, robbery was considered one of the greatest offenses. Hence the Rabbis say that the generation of the flood perished only because they committed robbery, though they were guilty of many other offenses.[28] The rabbinic distinction between theft and robbery is also found in Roman law, but the Romans instituted greater punishments for robbery than for theft, because the robber was considered an enemy of society and he might have been punished by death or lynching.[29] Though Philo adheres strictly to biblical law with regard to theft, and explains that if the thief cannot make restoration he can be sold into slavery, still he says that one who covetously desires to take away the property of others by force is an enemy of society (*κοινὸς πόλεως ἐχθρός*).[30] Goodenough may be correct that the distinction which Philo makes between the more and less serious type of stealing is Roman in character,[31] yet I am inclined to think that the fact that Philo makes no direct reference to the penalty for robbery indicates that the Jewish courts in Egypt, like the Palestinian courts, instituted no capital punishment for robbery but only restitution of the thing robbed. It is rather striking that one passage in rabbinic literature gives the impression that though the Romans did not consider theft a capital offense *for a Roman citizen*, the law for Jews was

[28] Sanh. 108a.
[29] See Roby, *Roman Private Law*, II, 216.
[30] *De Decalogue*, 135.
[31] *Jewish Courts in Egypt*, p. 149.

stricter. The Talmud relates that R. Eliezer ben Simon was employed as a government agent to catch thieves. R. Joshua ben Karha was opposed to such a profession and he asked R. Eliezer, "Until when wilt thou turn over the people of our God to death?" On this R. Eliezer replied, "I destroy the thorns of the vineyard," but R. Joshua said "Let the owner of the vineyard destroy his own thorns."[32] This passage suggests that the Roman government punished thieves by death. In general we are under the impression, however, that neither the Bible, nor rabbinic literature, nor Philo considers common theft a capital offense. The standard penalty of theft is paying double the amount stolen.

The distinction between theft and robbery is not found in Josephus. He speaks only about common theft and in the *Antiquities* he follows closely the biblical law: "Let death be the punishment for stealing a man, but he that hath stolen gold or silver, let him pay double."[33] Hence in the *Antiquities* Josephus knows of no other penalty for ordinary theft than paying double the value of the thing stolen. In *Contra Apionem*, II, Josephus speaks about the law of theft in different terms. He writes, "Moreover even fraud in such matters as weights or measures, or injustice or deceit in trade, or stealing another man's property, or laying hand on what one did not deposit, all such crimes have punishments attached which are not on the same scale with other nations, but more severe."[34] Josephus' comparison between the Jewish and Roman law of theft suggests that the Jewish law is stricter than the Roman. From the sources discussed above one is led to believe that Jewish law is more lenient than Roman and especially

[32] B. M. 83b.
[33] *Ant.*, IV, 8, 27.
[34] *Contra Apionem*, 30 (216).

Greek and Attic law which originally treated theft and robbery with great severity. Reading this passage in Josephus we are inclined to think that Josephus hints that Jewish law considers theft a capital offense. Büchler claims that the law of theft discussed by Josephus is based on Sadducean principles,[35] but this theory is a conjecture since we have no knowledge of the Sadducean law with regard to theft. Furthermore Josephus uses the term ὑπειρέω in the *Antiquities* and in *Contra Apionem*, and even in the *Antiquities* he knows of no other penalty than the double payment, while in *Contra Apionem* he considers theft a capital offense. The same contradiction however is also found in Philo. In the *Fragment* where he speaks about Jewish law he says: "If you steal whether common or sacred things (ἐὰν βέβηλα, ἐὰν ἱερὰ παρακλέπτης) death is equally the penalty (θάνατος ὁμοίως)."[36] This is the only Jewish source ante-dating Josephus which considers theft a capital offense. In the *Fragment* Philo also says: "No one shall apply a false balance or an inadequate measure or bad money." The whole passage about theft and cheating discussed by Josephus is found in the *Fragment*, and the penalty prescribed in both is the same. When Josephus wrote *Contra Apionem*, II, he either had the work of Philo before his eyes, or had the same Alexandrian source that Philo did.

Rape

Josephus in *Contra Apionem*, II, makes another direct comparison between Roman and Jewish law and this passage, like the passage on theft, presents many difficulties. Josephus tries again to show the strictness of the Jewish

[35] *Sin and Atonement*, pp. 389–392.
[36] *Fragmenta*, 629.

law in comparison with that of non-Jewish lawgivers. He writes: "I omit to speak concerning punishments, and how many ways of escaping them the greater number of legislators have afforded malefactors by accepting fines in cases of adultery, marriage in case of corrupting" (ἐπὶ φθορᾶς δὲ και γάμους).[37] This suggests that Josephus thinks that the Jewish law is stricter in case one corrupts an unmarried woman. Whiston in his note, ad loc., makes reference to the striking disagreement between the *Antiquities* and *Contra Apionem*, II. In the *Antiquities* he says, "He that corrupts a virgin that is not yet bethrothed shall marry her himself."[38] Hence the Jewish law is actually the same as the law of the heathen lawgivers to whom Josephus refers in *Contra Apionem* and his criticism against them is entirely unjust. More striking is Josephus' view in another passage in *Contra Apionem* where he says that for violating an unmarried woman (ἄν βιάσηται κόρην) the penalty is death.[39] Some of the translators of Josephus try to emend the text by changing γάμους into γαμῶν, which would mean that for adultery the heathen lawgivers allowed this compensation in money, and by κόρην Josephus means a betrothed woman. There is no need to argue that these emendations are merely an attempt to make these two striking passages in Josephus harmonize, but these emendations are by no means plausible.

If, however, we assume that Josephus had an Alexandrian source for *Contra Apionem*, II, all the difficulties disappear. It should be noticed that there is a slight difference between the two passages in *Contra Apionem* and the *Antiquities*: in the latter Josephus speaks strictly about a παρθένος, whereas in the former he speaks about an unmarried

[37] *Contra Apionem*, 38 (276).
[38] *Ant.*, IV, 8, 23.
[39] *Contra Apionem*, 30 (215).

woman in general. In rabbinic literature the biblical law that if one violates a virgin he must marry her was applied only to a virgin; violence on a girl who had reached maturity or on a divorcee or widow did not obligate marriage.[40] We have no direct reference in rabbinic literature to the penalty for raping an unmarried woman. Philo also applies the biblical law only to a virgin, but he also gives us a bit of legislation with regard to the penalty of doing violence to an unmarried woman. He writes: "If any one forcibly dishonors (*βιασάμενος αἰσχυνῃ*) a woman who has been widowed either by the death of her husband or by some sort of divorce, he has committed a lighter offense than adultery, about one half as serious, and so shall be relieved of the death penalty. But since he has regarded the most base things as the most desirable, let him be indicted for forcible deprivation (*βίαν*), contumelious assault (*ὕβριον*), criminal lack of control, and impertinence, and let the judge decide in this particular case whether he is to be punished in person or by fine."[41] There is no doubt that by the term (*χήρη*) Philo does not mean to say that this law is applied only to a widow or a divorced woman. He merely uses these terms in opposition to the same law in case of a *παρθένος* which he discusses later. Hence violence to an unmarried woman was not classed among the Alexandrian Jews as robbing a virgin of her virginity or equivalent to adultery, but a crime which could be punished by court. This law no doubt was derived from Palestinian Halakah but may have been practically effective only in Alexandria. Josephus, like Philo, in *Contra Apionem*, II, uses the term *βιαζω* for raping an unmarried woman. If Josephus had this Alexandrian source before his eyes he could easily have spoken of the crime of *βία* to an unmarried woman

[40] Ket. 3. 7.
[41] *Spec. Leg.*, III, 69.

as a capital offense since we have seen that the tendency among the Alexandrian Jews, when they spoke as defenders of their laws, has been to consider the more serious offenses as capital crimes punishable by death. However, this law in *Contra Apionem* does not contradict the law in the *Antiquities* which deals with one who seduced or raped a virgin. The former is an additional piece of legislation of the Alexandrian courts whereas the latter is merely a repetition of the biblical law. On this hypothesis the two passages in *Contra Apionem*, II, are readily explained on the assumption that Josephus drew from an Alexandrian source.

The Synagogue and the Sabbath[42]

One of the striking elements in Josephus, to which Moore has called attention, is that nowhere in his writing does he refer to the institution of the synagogue. Moore assumes that the reason Josephus fails to mention this institution is that he knew very little about Jewish life.[43] But this seems extremely doubtful even assuming that Josephus was not as great a scholar as he boasted himself to be. It is almost incredible that he should have had nothing to say about the synogogue if it had been the center of Jewish life and religion and it is more likely that the synagogue in Palestine, especially in Jerusalem, during the

[42] I am not concerned in this paper with the origin of the synagogue, a subject upon which a vast amount of literature has been written (see S. Zeitlin, "The Origin of the Synagogue," *Proceedings of the American Academy for Jewish Research*, (1930–31), pp. 69–81). I am here primarily interested in the institution of the synagogue as a school of learning in Alexandria.

[43] *Judaism*, I, 210. The term συναγωγή appears in Josephus more frequently than in Philo. This term is found in Philo in *Quod Omnis Probus Liber*, chapter 12 (οἳ καλοῦνται συναγωγαὶ). The general term in Philo for the synagogue is προσευχή. It is true, however, that Josephus does not discuss the institution of the synagogue.

existence of the Temple did not play an important part in the development of religious ideas and theological doctrines. The academies were the places where Jewish laws and customs were discussed and formulated, the Temple was the place of worship and cult, but the synagogue was still in its infancy and there was very little Josephus would have said about it. In the Diaspora and in Galilee, however, the synagogue became an important factor in Jewish life at a much earlier period. From the description of Philo as to how the Jews spend the Sabbath in the synagogue we gain the impression that the synagogue in Alexandria was not merely a place for prayer and reading parts of the Scripture (customs undoubtedly borrowed from Palestine), but a place where the Alexandrian Jews gathered every Sabbath to discuss the Law, philosophy, and matters relating to the religious life of the community. The synagogue was actually the *Bet ha-Midrash* as well as a "house of prayer." We do not know whether there were established Jewish institutions of learning in Alexandria besides the synagogues, where instruction was given only once a week, but if so, Philo makes no reference to them. Adults acquired advanced education through the sabbatical discussion and then, "the husband appears to be the master, endowed with sufficient authority to explain these laws to his wife, a father to teach them to his children, and a master to his slaves."[44] Jewish education in Alexandria seems to have been given at home by the head of the family and consisted in the main of the instruction given by great teachers on the Sabbath. There is no doubt that in Palestine Jewish education was not limited only to the Sabbath. Jewish theology, law, and customs were taught in the schools.

[44] *Fragmenta*, 630–631.

It is interesting to note, however, that though Josephus makes no open reference to the synagogue, one passage in *Contra Apionem*, II, suggests definitely that Josephus has in mind the Alexandrian synagogue. Josephus writes: "He appointed the law to be the most excellent and necessary form of instruction, permitting the people to leave off their other employments and to assemble together for the hearing of the law and to obtain a thorough and accurate knowledge of it, and this not once or twice or oftener, but every week, which thing all the other legislators seem to have neglected. Indeed most men, so far from living in accordance with their own laws, hardly know what they are, for they employ professional and legal experts as assessors and leave them in charge of the administration of affairs. But should any one of our nation be questioned about the laws, he would repeat them more rapidly than his own name. A transgression is a rarity; evasion of punishment by excuse an impossibility. Even our women folk and dependents will tell you that piety must be the motive of all our occupation in life."[45] Josephus' reference to the weekly instructions in the Law undoubtedly applies to the sabbatical instructions which the Jews received in the synagogue. The custom of reading part of the Scriptures every Sabbath during services is very old: Josephus and Philo ascribe this innovation to Moses. The Palestinian Jews used to complete the reading of the Pentateuch during a period of three years and through this usage the Jews became acquainted with the correct reading of the text.[46] Josephus' argument that during the weekly instructions the Jews became so well acquainted with the Law that they needed no interpreter could hardly have been applied

[45] *Contra Apionem*, 17–18 (175–178).

[46] Meg. 29b; see Büchler, "The Reading of the Law," *JQR*, V (1893), 420–463.

to the reading of the scriptural passages in Palestine, which was primarily a part of the religious services of the Sabbath. I am inclined to think that Josephus has here in mind the Alexandrian Synagogue where the Sabbath was devoted to the discussion of the Law and other religious matters and which constituted the greatest part of the Jewish education. This argument may become more convincing when we compare the *Hypothetica* with the passage in Josephus. The passages are so alike that it can hardly be doubted that they are derived from the same source. Philo writes: "The lawgiver thought that it ought to be derived from some admirable circumstance, that they should not only be competent to do other things, but should also be imbued with a thorough knowledge of their national laws and customs. What then did he do on this Sabbath day? He commanded all the people to assemble together in the same place and to sit down with one another, to listen to the Law with order and reverence, in order that no one should be ignorant of anything that it contains. . . And some priest or some one of the elders reads the sacred laws to them and interprets each of them separately till evening. Therefore they do not go to interpreters of laws to learn what they ought to do, and even without asking, they are in no ignorance respecting the laws. If you ask any one of them about their national customs and laws, they can tell you at once without any difficulty; and the husband appears to be a master, endowed with sufficient authority to explain these laws to his wife, a father to teach them to his children, and a master to his servants."[47] It is worth noticing that Philo in the *Hypothetica* does not refer any longer to the philosophic discussions the Jews held in their synagogue during the Sabbath. He speaks only about the Law. This passage was primarily written

[47] *Fragmenta*, 630–631.

against the slanderers of the Jewish Law and Moses. Hence Philo limits himself only to the Law and tries to show how different Moses was from other legislators. The reading of the Law during the Sabbath mentioned in this *Hypothetica* has little resemblance to the Palestinian custom of reading the Law during the morning service. Philo says that the Law is read and discussed till evening. The similarity of the argument, as well as of the thought, between the *Fragment* and *Contra Apionem*, makes it highly probable that Josephus merely changed a few phrases of the passage discussed by Philo, but his main source is either the *Hypothetica* of Philo or an equivalent Alexandrian source.

Family Festivals

Every nation has its own festivals and ceremonies which are the expression of joy and gratitude for unusual and happy events which occur in the national and family life. In *Contra Apionem* Josephus includes a peculiar bit of Jewish legislation with regard to family festivals. He writes: "Nay, indeed, the Law does not permit us to make festivals at the birth of our children and thereby afford occasion of drinking to excess, but it ordains that the very beginning of our education should be immediately directed to sobriety."[48] It seems that Josephus refers to the celebration of newly born children merely as one example of family festivals, but the same rule would be applied to all other festivities. This law has no precedent in the whole field of Palestinian literature. Family festivals at the time of the rite of circumcision, weddings, and betrothal-feasts were celebrated in Palestine with great ceremonies. Wine was freely used at such occasions and dances often followed. Many stories in the Gospels also reflect the spirit of festivity

[48] *Contra Apionem*, 25 (204).

which was present among the Palestinian Jews on such occasions.[49] It is therefore highly improbable that Josephus had a Palestinian custom in mind when he wrote this passage.

We have no description in Philo of the way in which the Alexandrian Jews celebrated their festivals, apart from those occasions devoted to the study of the Law and philosophy, and it seems likely that festivals in Alexandria were dedicated to education as the only periods during the year when the Jews could come together and acquire a knowledge of Jewish traditions. The joyous atmosphere at festivals which prevailed among the Palestinian Jews seems to have been lacking among the Alexandrian Jews. In an instructive passage Philo makes a comparison between Jewish and Greek festivals. He argues that a festival does not mean a time when people rejoice, for God alone who is perfect is able to rejoice and be free from all sorrow. A human being can acquire a festive spirit only through the improvement of his soul and mind by education. This is Philo's conception of a festival and therefore he claims that festivals do not belong to men. Philo then makes a striking comparison between the Jewish and Greek idea of a festival. He says: "And it has been shown that it is suitable to his character to keep festivals; Sabbath and festivals therefore belong to the great Cause of all things alone, and absolutely to no man whatever. For come, if you please, and contemplate with me the much celebrated festive assemblies of men. As for those which among the barbarians and Greek nations have been established in compliance with fabulous fictions, all tending to no other object than to excite vain pride in various nations, they may be all passed over, for the entire life of a man would

[49] See J. Mann, "Rabbinic Studies of the Synoptic Gospels," *Hebrew Union College Annual*, 1924, pp. 324–325.

not be enough to make an accurate and thorough investigation of all the absurdities which exist in each of those festivals. In every festival and assembly among men, the following are the most remarkable and celebrated points: security, relaxation, truce, drunkenness, reveling, luxury, amusements, music at the door, banquets throughout the night, unseemly pleasures, wedding feasts during the day . . . wakefulness during the night for the indulgence of immoderate appetites, sleep by day when it is the proper time to be awake, turning upside down the laws of nature. At such a time virtue is ridiculed as a mischievous thing, and vice is caught at as something advantageous."[50] The difference between Philo's conception of a festival and the Greek idea of festivity is very great. It seems that the Alexandrian Jews who lived among a Greek-speaking population were acquainted with the vicious temper of pagan weddings and festivals in general, and went to the other extreme, abstaining from wine and other inducements to immoral conduct. A festival became a day of study and devotion in the synagogue; the joyous and merry-making spirit disappeared and the festival became a season of contemplation. It may be doubted whether the whole Alexandrian community really followed Philo's ideal in this regard, but that many Jews really abstained from celebrating family festivals in such ways that may resemble the Greek festivals seems to me highly probable.[51] When

[50] *De Cherubim*, 90–92.

[51] I do not claim that Philo and the Alexandrian Jews were ascetics. On the contrary, Philo was even a keen observer of athletics and sports (*Quod Omnis Probus Liber*, 26). He was also a frequenter of banquets (*Quod Omnis Probus Liber*, 141). In *De Ebrietate* Philo does not prohibit the drinking of wine. Philo's comparison between the Jewish and Greek festivals shows, however, that he and the Alexandrian Jews spent their festivals not in drinking and merry-making but in studying of the Law. The Hellenistic Jews were careful to distinguish their festivals from the pagan festivals on which occasions many vices were committed.

Josephus speaks about the Law not allowing festivities when a child is born and "thereby affording occasion for drinking to an excess," he must have had an Alexandrian source for it. Josephus' view is reflected in the passage of Philo quoted above but is contrary to Palestinian usage.

Revealing of Secrets

Josephus tries to show the Roman world the great mutual devotion existing among the Jews. First he defines the Jewish attitude towards filial piety, then he goes on to say: "It allows us to conceal nothing from our friends, for there is no friendship without absolute confidence, in the event of subsequent estrangement. It forbids the disclosure of secrets (κἂν συμβῇ τις ἔχθρα πόρρητα λέγειν κεκώλυκε).[52] Such a law is found neither in the Bible nor in rabbinic literature, but in the *Antiquities* Josephus says that the Essenes "Neither hide anything from those of their own sect nor reveal to others any of their secrets though urged by death."[53] Among the Essenes disclosure of secrets meant the secrets of the sect after a member was initiated by an oath and this has hardly anything to do with the passage of Josephus where he speaks about the idealism of Jewish friendship. Josephus seems to be eager to bring out the main point that secrets must not be disclosed in time of estrangement, but it is natural that in case of real friendship no secrets may be kept. The fact is that neither Philo in the main body of his writing nor Josephus in the *Antiquities* makes reference to such a law. In the *Hypothetica* the passage of Josephus is found practically verbatim and is considered a Mosaic prohibition. "Let not the secret of a friend be revealed in time of estrangement."[54] (μὴ φίλων

[52] *Contra Apionem*, 27 (206–207).
[53] *Bellum Jud.*, XII, 8, 3.
[54] *Fragmenta*, 580.

ἀ πόρρητα ἐν ἔχθρα φαίνειν). It may be that the term ἔχθρα in Philo as well as in Josephus means a foreign country. This is how Yonge translates the term in the *Hypothetica*. If this translation be correct it is highly probable that the slanderers of the Jews accused the Alexandrian Jews of not being devoted to their country and therefore not deserving the right of citizenship. They are not trustworthy for they tell the secrets of the government to foreign rulers.[55] The reply was that the Jewish Law ordained that secrets must not be kept from real friends but prohibited the telling of secrets to foreign countries. Whether or not this interpretation is correct, our main argument is still valid. Josephus' view that the Law prohibits the disclosure of secrets has its origin only in Alexandrian jurisprudence and we have no reason to doubt that Josephus either read the *Hypothetica* or the source upon which it was based.

Immortality and Resurrection

One of the questions which the slanderers of the Jews never neglected to ask was if the Jewish assumption that their religion is the true religion be correct, why then are the Jews persecuted and discriminated against, executed by the hundreds and still God neither fights their cause nor protects them? The easiest solution the pagan could give to such a problem was that something must be wrong internally with the nature of the Jewish race and religion

[55] In rabbinic law, an informer was considered the greatest criminal. The habitual informer who treacherously delivered secret information about his co-religionist had no legal standing in the Jewish community. The extermination of the informer was made a public duty (see B. Ḳ. 117a and Maimonides, *Mishneh Torah, Hobel u-Mazzik*, 8.10). Bearing this rabbinic jurisprudence in mind, we can better understand why Philo classifies the telling of secrets in foreign countries as a capital offense.

as a whole. The loyalty of the Jews to their customs and laws even at the price of death was always incomprehensible to the gentile world. To the Jew the Law meant the revealed word of God and to violate any of the laws was equivalent to the violation of the word of God. Jewish devotion to the Law in post-biblical times reached the highest level. Violation of the Law meant spiritual death and hence it was better to die a martyr's death rather than transgress the word of God. The problem why should the Jew suffer death if he is really righteous had already been answered by the seven Jewish martyrs in II Maccabees: "Thou dost dispatch us from this life, but the King of the world shall raise us up who died for his laws and revive us to life everlasting . . . Tis meet for those who perish at man's hands to cherish hope divine that they shall be raised up by God again; but thou shalt have no resurrection."[56] The Jewish martyrs looked upon the tragedy of their death as brightened by the hope of a new life at the time of resurrection. Their life will be perfected in another state of existence, where all the apparent evils of this life will be abundantly rectified. In other words, the problem why the righteous should suffer was solved by the hope of bodily resurrection which is in store for the righteous.

Josephus in *Contra Apionem*, like II Maccabees, gives the same answer to the question why the Jews are willing to suffer death for the sake of the Law, but the phraseology in Josephus is somewhat different. He writes: "The reward for such as live exactly according to the Law is not silver or gold; it is not a crown of wild olive or of parsley with any such public mark of distinction; but every good man hath his own conscience bearing witness to himself, and by the virtue of our legislator's prophetic spirit and of the firm security, God himself affords such grant to those

[56] II Macc. 7.9–14.

who observe the laws, even though they be obliged readily to die for them, they shall come into existence again and receive a better life than they had before." (ἔδωκεν ὁ θεὸς γενέσθαι τε πάλιν καὶ βίον ἀμείνω λαβεῖν).[57] Josephus says that the martyrs for the sake of the law shall enjoy another existence which will be better than the life they lived before, but he does not say that this new existence means a resurrection of the righteous such as is indicated in the passage in II Maccabees. When we compare the phraseology which Josephus uses in the *Antiquities* and *Bellum Judaicum* with regard to the future life we see that the new existence in *Contra Apionem* is entirely different in nature. Josephus states that the Pharisees believe that all souls are imperishable, but only the soul of the good passes into another body (μεταβαίνειν δὲ εἰς ἕτερον σῶμα).[58] The righteous have the capability of coming to life again (τοῦ ἀναβιοῦν),[59] whereas the Sadducees deny even the survival of the soul—it perishes with the body. Hence we see that according to Josephus the Pharisees believed in bodily resurrection whereas the Sadducees denied even the doctrine of immortality. In *Contra Apionem* Josephus does not speak about bodily resurrection but he speaks about the righteous coming again into a better existence as an indisputable Jewish doctrine. The different phraseology used in *Contra Apionem*, and the fact that Josephus makes no reference to any disagreement about the belief in the future life, show that this passage does not belong to the same source as the *Ant.* and *Bellum Jud.*, nor has Josephus in mind here the Pharisees. The passage in *Contra Apionem* reflects, however, an Alexandrian source.

[57] *Contra Apionem*, 30 (217–218).
[58] *Bellum Jud.*, II, 8, 14.
[59] *Ant.*, XVIII, 1, 3.

Philo often refers to Jewish sects in Alexandria with whom he disagrees in doctrine and exegesis. Sometimes he criticises the extreme allegorists who apply a symbolical interpretation to the Bible and abrogate the actual law. At other times he criticises the literalists who refuse to apply any allegory, but he never makes reference to a disagreement among the Jews in Alexandria about the belief in the immortality of the soul. He rather finds this doctrine embodied in many biblical verses and bases a great part of his philosophy and theology upon it. It may be that the Alexandrian Jews who lived among a Greek-speaking population borrowed the Greek conception of immortality at a much earlier time than the Palestinian Jews and that in Alexandria the doctrine of immortality was unanimously accepted by the Jewish community. The Alexandrian Jews moralized their conception of immortality, even as the Palestinian Jews moralized their doctrine of resurrection. In the story of Cain and Abel, Philo endeavors to explain the old question why the righteous are killed and the wicked prosper. He writes: "For behold one of these two brothers is guilty of those enormous crimes which have been mentioned already, namely, impiety and fratricide; and he is still alive, and begetting offspring and building cities. But the other who was praised in respect of his piety is treacherously put to death; while the voice of the Lord clearly not only cries out that the existence which is perceptible by the outward senses is not good and that such a death is not evil (*neque mors mala*) but also that life which is in the flesh is not life, but there is another life given to man free from old age and immortal."[60] In this particular passage we have in Philo's exegesis a reflection of the Jewish attitude towards the persecutions which they suffered from their pagan rulers. The conception of

[60] *Quaes. in Gen.*, I, 76.

immortality was Judaized. Abel suffered in this world but his share will be recompensed in the immaterial world. Cain who committed murder has no share in the future life. Some rabbinic passages indicate that the same view was held by the Palestinian Jews with regard to resurrection. "A day of rain is worth more than that of the resurrection of the dead, for the former is alike for the righteous and the unrighteous, and the latter is for the righteous only."[61] In another passage Philo says: "What is the meaning of the expression 'the voice of thy brother cries to me out of the earth?' This is especially an example by which to take warning for the Deity listens to those who are worthy, although they be dead, knowing that they are alive in an incorporeal life. But He averts his countenance from the prayers of the wicked, though they are living a flourishing life, inasmuch as He looks upon them as dead to any real life, carrying about their bodies like a sepulchre, and having buried their miserable soul in it."[62] As far as I know this is the only passage in Philo where he speaks about the dead having an actual existence in which God listens to their demand while remaining deaf to the prayers of the wicked. A striking parallel to this view is found in rabbinic literature. "The righteous after their death are called living beings; the wicked even while they are alive are called dead."[63] As far as we can judge from the work of Philo the Alexandrian Jews believed in the new incorporeal existence after death and this incorporeal existence was granted primarily to the martyrs and righteous men, but not to the wicked. The conception of immortality assumed a moral significance. The afflicted and persecuted in this world will triumph in that future immortal state

[61] Ta'an. 7a.
[62] *Quaes. in Gen.*, I, 70.
[63] Ber. 18a, b.

which is the real life; the souls of the wicked will not gain the immortal life but will be condemned to complete annihilation. In *Ad Gaium* Philo sees in the moral belief of immortality the readiness of the Jews to suffer death rather than violate any of the commandments. He writes: "But the single nation of the Jews was suspected by him (Gaius) of wishing to oppose his desire, since it was accustomed to embrace voluntary death so as to enter immortality in order not to destroy any of their national or hereditary customs."[64] Hence we have seen from the work of Philo that the doctrine of immortality of the soul which meant the coming into a new incorporeal existence was a common doctrine among the Alexandrian Jews, but the belief in immortality had more of a religious than philosophical value, for the new existence after death was offered only to the righteous and martyrs. We have, however, no reference in Philo to the belief in bodily resurrection. I believe that the passage in *Contra Apionem* which speaks about the new existence after death as a compensation for the earthly suffering is based upon an Alexandrian source and it is very likely that this doctrine was included in the *Hypothetica* of Philo. The passage in *Contra Apionem* about the future life is independent of the passages in the *Antiquities* and *Wars* which deal with the disagreement between the Sadducees and Pharisees about the resurrection of the dead.

Burial of the Dead

So far we have claimed that the legal material and ethical values of *Contra Apionem*, II, discussed in this paper have their background only in Alexandrian sources and are foreign to Palestinian jurisprudence as far as we can judge from the *Antiquities* and rabbinic literature. There are

[64] *Ad Gaium*, 117.

some other laws in *Contra Apionem* which originate in the Bible but can easily be traced to Palestinian as well as Alexandrian sources. The fact that Philo in the *Hypothetica* and Josephus in *Contra Apionem* select the same laws for the defense of the Jewish constitution, and make no reference to them in the main body of their writings, suggests that Josephus took these materials along with the matter discussed before from the same Alexandrian source. In several passages Josephus gives a Palestinian touch to these laws and in other places he adds an Alexandrian interpretation foreign to Palestinian tradition. One outstanding example may be Josephus' discussion of the duty to bury the dead. He writes: "The pious rites which it provides for the dead do not consist of costly obsequies or the erection of conspicuous monuments. The funeral ceremonies are to be undertaken by the nearest relatives and all who pass while a burial is proceeding must join the procession and share the mourning of the family. After the funeral the house and its inmates must be purified in order that any one guilty of murder may be very far from thinking himself pure."[65] This passage in Josephus is in agreement with Palestinian law concerning the honor due to the dead. Though we have no reference to laws of burial in the Bible, the Rabbis considered it the duty of an Israelite to bury even the dead of the Gentiles.[66] The duty of burying the dead seems to have been upon the nearest kin, as this passage in Josephus and the story in the Gospels about the disciple of Jesus who wanted to forsake his master in order to bury his father, indicate. Josephus' view that the funeral expenses must not be great is also in agreement with the Palestinian usage of Josephus' time. The Talmud relates that in former days burial expenses were a great

[65] *Contra Apionem*, 26 (205).
[66] Giṭ. 61a.

burden upon the relatives of the dead, so that they used to run away without burying their dead. R. Gamaliel discontinued this custom by commanding that he himself should be buried in cheap linen garments.[67] Josephus wants to show the pagan world the Jewish piety which is extended to those who are dead as well as to those who are living. In the *Hypothetica* Philo also takes the honor given to the dead as an example of Jewish piety. As a Mosaic command he includes "No one shall keep any one from performing funeral honors to the dead, but shall throw upon them as much earth as is sufficient to protect them from impiety; no one shall violate or move in any manner or degree whatever the graves, or tombs, or memorials of the dead."[68] To lie unburied, without the customary funerary rites, or to be cast out of the tomb, was an aggravation of death even in biblical times.[69] In Tobit the duty to bury the dead is considered a charitable act. The custom of burying the dead was always considered a sacred duty among the Jews everywhere and the assumption of an Alexandrian source appears superfluous in explaining Josephus' discussion of this matter. One point, however, betrays the use of our hypothetical Alexandrian source even at this point. Josephus says that the house and the inmates must be purified after the dead body is buried "in order that any one guilty of murder may be very far from thinking himself pure." This seems to be Josephus' reason for the biblical law that if one touches a dead body he becomes ritually defiled. Such a symbolic interpretation is foreign to Palestinian literature, but is found in Philo. "The law has taken such exceeding care that no one shall ever be the cause of death to another, that it does not look upon those who have touched a dead

[67] Ḳid. 8b; *Tosefta Niddah*, 9, 17.
[68] *Fragmenta*, 629.
[69] Jeremiah 16.4.

body as pure and clean until they have washed and purified themselves."[70] Here also it is uncertain whether Josephus read the main body of Philo's writing but the interpretation certainly goes back to an Alexandrian source and possibly was originally included in the same portion of the *Hypothetica* now lost to us.

Marriage[71]

There are some other laws in *Contra Apionem* which are undoubtedly based upon Alexandrian sources, but we can appreciate that only when we compare the passages in *Contra Apionem* with the same laws discussed by Philo. A striking instance is Josephus' definition of the Jewish conception of marriage, and the preliminary steps to be taken by a man who claims the hand of a girl. Josephus writes: "What are our marriage laws? The law recognizes no sexual connections, except the natural union of man and wife and that only for the procreation of children"[72] (καὶ εἰ μέλλοι τέκνων ἕνεκα γίνεσθαι). It seems that Josephus hints here that according to Jewish law marital relation are permitted only for the sake of begetting children. It is true that the Rabbis have also emphasized that the end of marriage is the fulfillment of the commandment of "be fruitful and multiply." Though the purpose of marriage in rabbinic literature is the perpetuation of the human race, still Josephus' statement that the law permits sexual relation between husband and wife only for the procreation of children is contrary to rabbinic literature. According to tannaitic Halakah one of the obligations in marriage is sexual relation between husband and wife. This principle

[70] *Spec. Leg.*, III, 64.

[71] The laws of marriage and divorce in *Specialibus Legibus* I shall discuss separately in my work on Philo.

[72] *Contra Apionem*, II, 24 (199).

the Rabbis derived from Ex. 21.10, "Her food, her raiment, and her conjugal rights shall not be diminished." The Shammaites said that if a husband vowed not to have intercourse with his wife she may consent for two weeks, but if the vow extends to a longer period she may demand a divorce, while the Hillelites said that one week is sufficient.[73] There is, however, a story told in the Talmud that R. Jose b. Halafta, a Tanna of the second century, had only six conjugal relations with his wife, and these were only for the sake of begetting children, and, therefore, he was blessed, that all his five sons were great scholars.[74] This story is rather a striking parallel to the view held by Josephus. The Talmud raises however, the question למימרא דר' יוסי מצות עונה לא קיים? and the Talmud changes the nature of the story.[75] Thus as far as we can judge from rabbinic literature the statement in *Contra Apionem* is not in agreement with the tannaitic conception of marriage.

It is interesting to note that in *Bellum Jud.* Josephus says that this conception of marriage was held only by the Essenes. "They think that those who decline to marry cut

[73] Ket. 7, 1; Tosefta Ket. 8, 3.

[74] Shab. 118b; Jer. Tal. Yeb. 1b.

[75] In Jer. Talm. Yeb. 1b the story is related that R. Jose b. Halafta performed levirate marriage (ייבם את אשת אחיו). Under ordinary circumstances one is not allowed to marry the wife of his dead brother, but in case the deceased brother left no children then the living brother must marry the widow in order that a child may be born so that "his name shall not be blotted out of Israel." Under such circumstances we may easily imagine that a pious man like R. Jose b. Halafta abstained from having marital relation with his brother's wife except for the purpose of begetting children who may succeed his dead brother. A similar view to that of Jose b. Halafta was held by his contemporary Abba Saul (Tosefta Yeb. 6, 9). The Talmud says that the Rabbis have gradually disfavored levirate marriage, because such marriages were demoralized and people used to marry the wives of their deceased brothers not for the sake of begetting children, but for the sake of their own benefits (Bek. 13a). Thus the story as told in Jer. Talm. is more authentic and is in agreement with the tannaitic Halakah.

off the chief function of life, the propagation of the race, and what is more, that, were all to adopt the same view, the whole race would very quickly die out . . . They have no intercourse with them during pregnancy thus showing that their motive in marrying is not self-indulgence, but the procreation of children."[76] It seems that both the Pharisees and the Essenes agreed that the purpose of marriage is the perpetuation of the human race, but the Pharisees maintained that marital relation is a biblical obligation even if one has already fulfilled the command of "be fruitful and multiply" while the Essenes believed that marital relation which is not for the sake of procreation of children is prohibited. It is, therefore, surprising that in *Contra Apionem* Josephus speaks about the Essenes' conception of marriage as an undisputed Jewish doctrine.

If we assume, however, that Josephus made use of an Alexandrian source, such as Philo, the difficulties would disappear. There has been a disagreement among students of Philo as to whether or not Philo's conception of marriage is based on Jewish or non-Jewish sources. Ritter claimed that the laws of marriage discussed by Philo are in agreement with the tannaitic Halakah,[77] while Heinemann, who is of the opinion that Philo knew nothing about the Oral Law, claims that the laws of marriage in Philo are contrary to the Halakah and are based on non-Jewish sources.[78] It seems to me beyond doubt that the laws of marriage discussed by Philo are based on the Palestinian Halakah, while his conception of marriage as a whole is not like the one held in tannaitic literature. Philo writes: "Many men, therefore, who marry virgins in ignorance of how they will turn out

[76] *Bellum Jud.* 11, 161; the passage in *Ant.* IV, 8, 24 has nothing in common with the passage in *Contra Apionem.*

[77] *Philo und die Halacha* pp. 66 ff.

[78] *Philons jüdische und griechische Bildung* pp. 263 ff.

regarding their prolificness, when after a long time they perceive by never having any children that they are barren should not send them away (μὴ ἀποπέμπωνται) are still wanting of pardon (συγγνώμης εἰσιν ἄξιοι). But those who marry women who have been tested by other men and ascertained to be barren, merely covet the carnal enjoyment like so many boars, and goats and deserve to be inscribed among the list of the impious men as enemies of God."[79] In tannaitic Halakah we can find striking parallels to the view held by Philo. The Mishnah says that if a man marries a woman and after ten years of married life she has not born him a child, he shall not abstain from keeping the law, of "be fruitful and multiply."[80] Heinemann says that Ritter made a mistake in saying that according to the Halakah he must divorce her. The Mishnah merely says that in such a case he may take another wife, according to Philo, however, he is not allowed to live with her. I disagree with Heinemann in his interpretation of the Mishnah. The Tosefta states that in such a case he must divorce her.[81] This Tosefta is interpreted in the Talmud in two different ways. According to some, he is morally obliged to divorce; according to others he is legally forced to divorce her.[82] Philo seems to be of the opinion that in case many years have passed and the woman has born no child, her husband can not be forced to divorce her. By the words "he may be pardoned" Philo means that he has a moral obligation to divorce her, so that if he does not divorce her, no measures can be taken against him. It seems that though polygamy was legitimate among the Jews, it was not a common practice and neither Philo nor the Rabbis would advise a man

[79] *Spec. Leg.*, III, 36.
[80] Yeb. 6, 6.
[81] Tosefta Yeb. 8, 3.
[82] Ket. 77a.

whose wife is childless to take a second wife. They would prefer divorcing the barren woman, than bringing two women in the house, which would only cause the breaking of the peace in the home.

Stricter is however, the Halakah, in case one married a woman who has been ascertained by her previous marriage to be barren. In such a case he is forced to divorce her and she loses her *Ketubah*.[83] Some Rabbis are even of the opinion that the sexual relation with such a woman is a relation of prostitution.[84] The Rabbis, however, were practical in applying those laws only to men who marry before they have established a family, but those who have had children from previous marriages may marry even sterile women.[85] The Mishnah which does not apply the biblical law of the ordeal of bitter water to prohibited degrees of marriage includes also among them marriage to a barren woman.[86] It is only the view of R. Eliezer that in case of sterility it is not considered a prohibited marriage for he may still marry another woman and establish a family. Philo also makes a distinction between marrying a woman who was found sterile after a number of years of married life and marrying women who are known to be barren. People who marry the latter kind of women are enemies of God, for to such men the institution of marriage is merely a means of gratifying their excess in lust and carnal pleasures.

Thus, Philo and the Halakah agree that the purpose of marriage is the begetting of lawful children. Philo seems, however, to go even further in saying that the law permits marital relations between husband and wife only for the

[83] Yeb. 65a.

[84] Yeb. 61a.

[85] With reference to polygamy see Ginzberg, *Eine unbekannte jüdische Sekte*, pp. 184 ff.

[86] Sotah 4, 1.

sake of the procreation of children. The biblical law prohibits marital relation during the period of the woman's menstruation and Philo says that the reason for this prohibition is that marital relations are permitted not for the sake of pleasure, and the gratification of lust and carnal enjoyment, but for the begetting of children and since during the period of menstruation one cannot cherish the hope of procreation, the law, therefore, prohibited marital relations during that period. Men who live with women at such a period are like farmers who sow their grain in unproductive places (*εἰς λίμνας καὶ χειμάρρους ἀντὶ πεδίων κατασπείροι*).[87] In another place Philo, like Josephus in *Contra Apionem*, says: "And because, with a view of the persistence of the human race, you were endowed with generative organs, do not run after rapes and adulteries and other unhallowed forms of intercourse, but only those which are the lawful means of propagating the human race" (*ἀλλ' ὅσαι μετὰ νόμου τὸ ανθρώπων σπείρουσί τε καὶ φυτεύουσι γένος*).[88] Philo also says that Moses participated in no pleasures, "save for the lawful begetting of children."[89] It is hardly necessary to make reference to other passages in Philo in order to show that the statement in *Contra Apionem* which says that marital relations are permitted only for the procreation of children is based on Alexandrian source. In the Roman world sexual immorality was widely spread and the Jewish Alexandrian restriction in marital relation could serve as a good example of Jewish piety, especially for apologetic purposes.

We have so far discussed the laws of marriage of *Contra Apionem* which have their background in Alexandrian sources. There are, however, a few other laws of marriage

[87] *Spec. Leg.*, III, 33 ff.
[88] *Quod Deterius Potiori*, 102.
[89] *Vita Mosis* I, 28.

in the *Hypothetica* which are also apologetic in character but not discussed by Josephus. Philo calls them Mosaic law, but we have no reference to such laws either in the Bible or rabbinic literature. Philo writes: "It is ordained not to separate the home of parents from that of their children (*μὴ παίδων διοικίζειν γονέας*) nor the home of the wife from that of her husband (*μὴ γυναῖκα ἀνδρός*) even though the man is her master having purchased her lawfully" (*καὶ ἂν νομίμως ἐωνημένος ᾖ δεσπότης*).[90]

In order to understand the real significance of this passage we must first bear in mind one striking difference between the *Hypothetica* and *Contra Apionem*. It is true that both treatises were written to show that the Jewish constitution is of greater ethical value than Roman, still Philo fails to make direct reference to Roman law. Josephus, however, makes a direct comparison between Roman and Jewish law. But when one studies carefully the laws in the *Hypothetica* and compares them with Roman law one can easily see that every single law in the *Hypothetica* is a criticism of Roman law by showing the ethical value of the Jewish constitution. In order to understand the passages in Philo we must first get some idea of the Roman conception of marriage.

Among the Romans there were two kinds of marriages: marriage with *manus* and marriage without *manus*. The term *manus* which literally in Latin means "hand" was used for the kind of marriage which subjected the woman to the power of her husband. Marriage with *manus* was contracted by the Romans by one of the three forms:

(1). *Conferreatio* which was a rite of great solemnity; the augurs were consulted; sacrifices were offered, and the parties joined in partaking of cakes. This type of marriage

[90] *Fragmenta*, 580.

was of a religious character. Only men who were born of such marriages were fit to enter the priesthood.[91]

(2). *Usus* consisted of a legal contract of marriage without any religious ceremony. Under such form of marriage the woman did not become the *materfamilias* unless she remained under her husband's roof for a year.[92]

(3). *Coeptio*, as the word itself implies, was marriage by purchase, and this is undoubtedly the type of marriage which Philo hints by saying "though he has purchased her lawfully." The transaction appeared as a feigned purchase of the wife by her husband. As to the question whether or not it was a primitive form of purchasing a wife from her parents[93] is of no interest to us. All that we can say about this form of marriage is that it existed until the third century C.E.[94]

The marriage which was contracted especially under *coeptio* gave the husband unlimited power over his wife. Under such type of marriage which was always with *manus*, the woman left her original home and cult of her parents and joined the *gens* of her husband. Her father lost the privilege of *patria potestas* and by such marriage she became legally the daughter of her husband (*filiae loco*).[95] Marriage under *manus* entitled the husband to all the property his wife might acquire.[96] Since by marriage under *manus* the woman became a part of her husband's *gens*, therefore, Roman law denied her the privilege to the succession of her parent's estate.[97] The rights of the husband over his wife under *manus* were equivalent to the rights of a master over

[91] See W. Fowler, *Journal of Roman Studies* (1916) pp. 189–175.
[92] Gaius, I, III.
[93] See Rossback, *Untersuchungen uber die romische Ehe*, pp. 77–81.
[94] See P. E. Corbett, *The Roman Law of Marriage*, p. 85.
[95] Gaius, III, 3: sua heres est quia filiae loca est.
[96] Gaius, II, 98.
[97] See R. W. Leage, *Roman Private Law*, p. 103; C. W. Westrup, *Introduction to Roman Law*, pp. 100 ff.

his slave and he had even the right to sell her to somebody else. Plutarch, however, cites the law of Romulus that a husband who sells his wife has to bring offering of expiation (*τὸν δ' ἀποδόμενος γυναῖκα θύεσθαι χθονίοις θεοῖς*).[98] But this statement has never been taken to be of any legal validity,[99] but it may rather be considered a protest against the degraded position of the woman. The husband could surrender her to a plaintiff who sued him in respect of any civil wrong she had committed, thereby ridding himself of liabilities. In compensation for these disadvantages the wife under *manus* enjoyed many privileges. She became the *materfamilias* and the *filiae loco* to her husband with whom she shared equally all the honors in public life. She also succeeded to her husband's estate along with the children in the first rank of succession.[100] Thus Bryce characterizes Roman laws of marriage as beginning with two phenomena which seem to be inconsistent. One is the complete subjection of the wife to the husband on the legal side as regard to both person and property. On the other her complete equality on the social and moral side.[101] Thus as long as the woman was in her husband's home she shared socially equal rights with her husband, but the husband could degrade her position by separating his residence from his wife's either by selling her into slavery or any other such similar act.

The Jewish conception of marriage is quite equivalent to the Roman, but without the abuses. In rabbinic literature the husband has also ownership over his wife and at

[98] Plutarch, *Romulus* 22.

[99] See J. Bryce, "Marriage and Divorce under Roman and English Law," *Select Essays in Anglo-American Legal History*, II, 794; H. Goudy, *Law of Rome*, p. 23 and n. 12; P. E. Corbett, *Roman Law of Marriage* p. 109 and n. 1.

[100] *Leg. Coll.* 16, 2–3.

[101] *Select Essays in Anglo-American Legal History*, II, 786.

the time of marriage the father loses all the privileges over his daughter. Thus the earning of a wife and whatever she may find belongs to the husband.[102] Certain laws of marriage the Rabbis seem to have borrowed from Roman law. The Mishnah states that all tannaitic scholars agreed that the property the woman acquired after marriage proper she cannot sell to anyone forasmuch as the husband's possession of the woman also implies possession of her property (הואיל וזכה באשה לא יזכה בנכסים?), while Rabban Gamaliel could not find an origin in Jewish tradition for such a law.[103] It is highly probable that this Mishnaic law is an adaptation of Roman law of marriage under *manus*. The Jews, like the Romans, have restricted the woman's rights over her property.[104] Jewish law, however, never put the woman into complete subjection to her husband. The husband cannot force his wife to do work for other people, nor even unpleasant work in his own house.[105] In no period in Jewish history had the husband the right to sell his wife. The husband had many privileges over his wife, but in return he shared numerous obligations. Thus the conception of marriage under *manus* is also Jewish, but the Rabbis have not taken over the unethical element of Roman law of marriage.

The Alexandrian Jews have also followed the same policy. The Roman conception of a wife as *filiae loco* the Alexandrian Jews have accepted whole-heartedly. In a single paragraph Philo defines marriage which reflects the finer elements in marriage emphasized in Roman law and by no means contrary to Jewish law. When I read about the lofty ideals of Roman law by putting the woman in relation to her husband on the same level as the relation of a daughter to

[102] Ket., 4, 4.
[103] Ket. 8, 8.
[104] See also L. Epstein, *Jewish Marriage Contract*, pp. 107 ff.
[105] Kit. 61b.

her father, I noticed that this ideal is most beautifully defined by Philo. The latter writes: "He admonishes man that he should take care of his wife as of his daughter; and he admonishes the woman that she should honor her husband as her father. And very rightly, since the woman changes her habitation, passing from her own *progenie* to that of her husband. On which account it is altogether right and proper that he who has received should take upon himself the liability in respect of what has been given; and that she who has been removed should worthily give the same honor to her husband which she has previously given her parents; for the husband receives the wife from her parents, as a deposit which is entrusted to him and the woman receives her husband from the law."[106] This passage contains the nucleus of the social standing of a married woman under *manus*. The husband receives his wife from her father and also takes his place. By marriage the woman forsakes the *gens* of her father and joins the family of her husband. In the *Hypothetica*, however, Philo says that Jewish law does not permit the husband to fix the residence of his wife away from his home. The term (διοικίζω) may mean the sending away of his wife from his home; or it may also mean forcing the woman to leave the house by selling her to somebody else or any other form of depriving the woman of her home, an unjust privilege granted to the husband who contracted marriage by *coeptio* and this is undoubtedly what Philo means by the words "though he may be her master

[106] *Ques. In Gen.*, I, 27: Admonent virum ut sibi procurret mulierem veluti filiam; et mulierem, ut honoret virum sicuti patrem: iure quidem, quoniam habitationem mutat mulier (transiens) de sua progenie ad virum; quapropter debet et decet, qui suscipit, mutuo sibi assumere fidem datorum: quae vero translata fuit, quem parentibus iam antea honorem, cundem viro suo praestare condigne. Nam depositum commendatum sibi sumit vir mulierem a parentibus, mulier autem virum a lege.

having purchased her lawfully." This was exactly the form of marriage contracted by *coeptio*. Thus the Alexandrian Jewish community was willing to accept the Roman conception of marriage as long as it did not contradict the Jewish ideal,[107] but refused to follow the degrading position of married women under *manus*. In Roman law, the parent had also unlimited power over his children and therefore Philo also says that the law prohibits the separation of the children from their parents.

One interesting point in Roman marriage law is that husband and wife could not give each other substantial gifts.[108] Commentators say that the reason for this law is that the husband should not devestate his estate by bestowing gifts upon his wife. It may be, however, that since marriage among the Romans was originally under *manus* it was legally impossible for the husband to bestow gifts upon his wife for whatever she possessed automatically belonged to her husband. The Talmud also says that a woman can hardly be a possessor of anything for whatever is hers belongs to her husband.[109] Thus the Mishnah says that if one wounds a woman he is culpable, but if she wounds somebody else she is not culpable, because she has no money with which to make restitution. If the woman was divorced she is liable to make restitution.[110] Jewish law, however, did not go to the extreme of making void the gift given by

[107] The conception of a husband as a father is not entirely foreign to the Semitic world. In Jeremiah 3.4 the terms "father" and "friend of my youth" are used as synonyms. The Talmud also says that the wife, like the children, has to honor her husband (Ḳid. 31a). Robertson Smith writes that later Arabic writers were surprised when they found in early Arabic sources that the term father is used as a synonym to the term husband (*Kinship and Marriage in early Arabia*, pp. 117–118).

[108] *Lex Aquilia, Digest*, XXIV; see J. B. Thayler, *Lex Aquilia; on gifts Between Husband and Wife*, pp. 127 ff.

[109] Sanh. 71a.

[110] B. K. 8, 4.

the husband to the woman. If a husband gives a gift to his wife he loses all privileges over the article given.[111] In this respect Philo also seems to agree with Jewish law. In the *Hypothetica* he writes: "If a husband vows the (*τροφήν*) of his wife (*ἔαν επιφημίσῃ τροφὴν γυναικὸς ἀνὴρ*) she shall be sacred to receive the support." (*ἱερὰν εἶναι τροφῆς ἀνέχειν*).[112] Philo does not mean here that the husband deprived the woman of her support by a vow of prohibition, nor does Philo mean by (*τροφήν*) actual support, for Philo goes on saying that such vows are valid. But if the gift is of greater necessity to the one who made the vow than to the one promised, then such vows may under certain circumstances br broken. Philo undoubtedly speaks here about a promise made by the husband to give a substantial gift to his wife which is more than required for bare necessities of life. Philo applies the same law to father and son. As we have said before such gifts would be void under Roman law. Philo represents here the more liberal view held by Jewish law.

It is also highly possible that in the light of the Roman laws of marriage we may understand some complicated points in the marriage contracts of the Alexandrian Jews. The Tosefta relates that it was a common custom in Alexandria that women who had been betrothed to men were afterwards captured and married by other men. The Palestinian sages were about to consider the children of such unions, bastards. Hillel the Elder, however, said that since the Alexandrian Jews inserted in the *Ketubah* of the betrothal the clause, "When thou comest into my house, thou shalt be my wife" the marriage therefore, does not become legal until after the nuptials, and consequently if the woman in question happens to become the wife of another man, she

[111] B. B. 51a, b; see also Tosfat Ḳid. 24a.
[112] *Fragmenta* 628.

does not commit adultery, and the children of such unions are not bastards.[113] The question may be raised, however, why have the Alexandrian Jews inserted such a clause in the *Ketubah?*[114] One point seems to me quite certain that originally this clause was inserted not for the sake of abolishing the institution of betrothal, for if the case be so then it is inconceivable why Philo should ask the death penalty if a betrothed woman committed adultery. It seems that originally there was another reason for the insertion of this clause, but because of this insertion the betrothal gradually lost its legal value. In my work on Philo the matter will be discussed thoroughly, but here I would like to make a suggestion which may be a clue to the solution of the problem.

We have discussed so far Roman laws of marriage with *manus*, but among the Romans there was a form of marriage without *manus*.[115] This form of marriage became very popular in the Roman world in the last two centuries B.C.E. Marriage without *manus* the act whereby the marriage was contracted was a purely private act. No registration or other public record was required.[116] The two parties only

[113] Tosefta Ket. 4, 9

[114] See L. Epstein, *Jewish Marriage Contracts* pp. 7–8; 295–296; Gulack, "Deeds of Betrothals and Oral Stipulations in Talmudic Law," *Tarbiz* III, p. 361 off; *Spec. Leg.*, III, 72–74.

[115] The Roman laws of marriage without *manus* are thoroughly discussed by P. E. Corbett in his work *The Roman Law of Marriage* and by J. Bryce, "Marriage and Divorce in Roman and English Law," *Select Essays in Anglo-American Legal History* II, most of my references are taken from these two authentic works. See Mommsen, *Romisches Staatsrecht*, III, 36, n. 1.

[116] The *affectus maritalis* is the only thing which distinguished marriage from concubinage in Roman law. Corbett on p. 95 also quotes the Justinian Codex 5, 27, 10 and 11 which lays it down as a law that when two people living in concubinage, and being about to have an illegitimate child begin to regard each other with *maritalis affectio* they may legalize the child conceived or born by drawing up a dotal instrument. Under ordinary circumstances no legal contract was required to make marriage without *manus* valid. When the Mishnah in Ḳid., 1, 1 says that a

were deemed concerned. Consent of the two parties is what constituted marriage and as the Latin phrase, often quoted, reads *consensus facit nuptias*. Under such form of marriage the woman never entered "the home" of her husband or as the Roman jurists say the *manus* of her husband. The woman remained a member of her father's home and was still subjected to the *potestas* of her father. She did not acquire her husband's *civitas*,[117] nor did she become by such marriage the *materfamilias*.[118] Thus the marriage constituted only cohabitation of husband and wife, but the latter still remained a part of her father's *gens*. Property acquired by the woman remained hers and there was no right of interstate succession between them.[119] Children born of marriage without *manus* had for a long period of time no right of interstate succession to their mother's estate, since the woman still belonged to the home of her parents.[120] Since in case of marriage without *manus* the woman still belonged to the *patria potestas*, the father of the woman could divorce the couple without even their consent, for the woman was still under the power of her parents.[121] The two forms of marriage, one with *manus* and the other without *manus* were also known in the Orient. Robertson

woman may be acquired in marriage by intercourse it implies, indeed, that *affectus maritalis* is sufficient to constitute marriage even according to Jewish law. The Talmud itself raises the question as to what is the difference between a concubine and a married woman, and both Talmuds give the answer that a married woman has a Ketubah, but not a concubine (Jer. Tal. Ket. 29d; Sanh. 21a). Thus though marital relation constitutes marriage even according to Jewish law still a marriage contract such as the *Ketubah* was always required.

[117] See Mommsen, *Romisches Staatsrecht*, 111, 36, n. 1.

[118] Cicero, *Topica* 3, 14.

[119] See Corbett, pp. 117 ff.

[120] Ibid., p. 120.

[121] Paulus, *Sentent.*, V, vi, 15. This law was in usage until the time of Marcus Aurelius; see Levy, *Der Hergang der romischer Ehescheidung*, pp. 145 ff.; Corbett pp. 122 ff.

Smith claims that among the ancient Arabs there were two forms of marriages: the *Sadîca* marriage which consisted only of marital cohabitation, but the woman remained under the authority of her father.[122] This form of marriage is equivalent to marriage without *manus*, while the *ba'al* marriage was like marriage with *manus*. Cuq[123] traces these two forms of marriage even to the Assyrian laws of marriage which speak about a married woman who is still "in her father's house."[124] In the Roman world, however, this form of marriage prevailed and as a reaction against the marriage under *manus* the so-called free marriage gave the woman complete emancipation from her husband's authority.

It is hardly necessary to say that this form of marriage has no origin in Jewish law. Marriage without any contract; marriage which does not change the status of the woman, marriage through which the woman does not become a part of her husband's family and home; marriage which deprives the children of the right to succession of her property; and finally marriage which gives the father of the woman the right of breaking the marriage on his own initiative would not give her even the status of a concubine. But in view of the fact that this form of marriage became very popular in the Roman world, it is highly probable that the Alexandrian Jews who lived in a Roman environment have also started to contract such forms of marriage. In order to make clear the Jewish conception of marriage they inserted the clause "when thou comest into my home thou shalt be my wife according to the law of Moses and Israel." The law of Israel is that marriage is valid only when the woman belongs to

[122] *Kinship and Marriage in early Arabia*, pp. 92 ff.

[123] *Review d'assyriologie et archeologie orientale*, XIX (1922), 46 off.

[124] See, however, *The Assyrian Law*, by G. R. Driver and J. Gates, pp. 136 ff.

the home of her husband.[125] What the Romans called Hand (*manus*) the Jews called House and both terms are equivalent. Thus originally the purpose of inserting the clause was in order to distinguish between the Jewish and Roman conception of marriage, but indirectly it brought the downfall of the institution of betrothal, for the period between the betrothal and the nuptials the woman lived with her parents. Hillel the Elder therefore said that once the clause is inserted we do not have to emphasize the technical meaning of the clause, but take the whole clause literally (לשון הדיוט) which implies that she becomes his wife when she actually enters his home which takes place at the time of the nuptials, and by Hillel's literal and simple interpretation, many Jewish families in Alexandria were saved from eternal disgrace. Philo as well as many of Hillel's contemporary scholars in Palestine were not willing to follow the (לשון הדיוט).

The Woman Represented by a κύριος

After Josephus explains what the institution of marriage means to the Jews he keeps on saying: "It commands us, in taking a wife, not to be influenced by dowry, not to carry off a woman by force, nor yet to win her by guile and deceit, but to sue (*μνηστεύειν*) from the one who is lord to give her in marriage" (*παρὰ τοῦ δοῦναι κυρίου*).[126]

According to tannaitic Halakah only the father has the right to give his daughter in marriage to anyone of his choice, until she reaches majority, which is according to

[125] It is true that even in case of marriage without *manus* husband and wife lived together in the same house in the literal sense of the word, but legally the wife belonged to the house of her parents. When the Alexandrian Jews inserted the phrase כשתכנס לביתי they meant in the legal sense as *cum manus* in Roman law was meant in the legal sense.

[126] *Contra Apionem* II, 24 (200).

the Rabbis, until she reaches the age of twelve years and six months. The right of the father to give his daughter in marriage does not descend after his death to the brothers or to the mother. The Rabbis, however, ordained that the mother of the girl and her brothers might give in marriage with the girl's consent during her minority, but if on reaching majority she refuses to live with her husband, she was automatically released from him.[127] Thus according to the Halakah only the father, and the mother in case the father is dead can give a girl in marriage. The general term κύριος in *Contra Apionem* implies that the right of giving a girl in marriage is not limited to the father, but to anyone who has authority over her. Although the father may be considered the κύριος in matters of marriage still it is highly improbable that by παρὰ του δοῦναι κυρίου Josephus has in mind the father of the girl.[128] It is interesting, however, that the same passage is found in Philo. The latter also says that one must not try to win the heart of a girl by force or deceit, but if one really cares to marry a girl he must sue her from her parents, but if they are dead, from her brothers or he must ask her in marriage from the κύριος.[129] It seems that the Alexandrian Jews differed in this respect from the Palestinian Jews. In Palestine, only the father had the legal rights over his daughter. If, however, the father died the girl could act legally by herself, while among the Alexandrian Jews the girl was always

[127] Yeb. 13, 1: It may be, however, that originally the mother and the brothers had equal rights with the father in case the latter died, but for the sake of protecting the minor orphan the Rabbis ordained that when the orphan girl reaches maturity she can refuse to live with her husband who was chosen for her while she was a minor (see Finkelstein, "The Book of Jubilee and Halakah," *Harvard Theological Review* (1933), p. 55).

[128] See J. G. Muller, *Flavius Josephus Schrift gegen den Apion*, p. 319

[129] *Spec. Leg.*, III, 67.

represented by a κύριος or ἐπίτροπος in case of her father's death. It may be that the Alexandrian Jews followed Greek law,[130] though it seems that in Graeco-Egyptian law the woman was not represented by a κύριος.[131] It is significant for discussion to bear in mind that the Alexandrian Jews required the consent of a κύριος in case one wanted to marry a girl. It is in the light of Alexandrian customs that we can understand Josephus' words in *Contra Apionem* παρὰ τοὺ δοῦναι κυρίου.

Parents and Benefactors

Josephus discusses in several places the penalty of a child who rebels against his parents. In *Contra Apionen* he says: "Honor to parents the law ranks second to God, and if a son does not respond to the benefits received from them, for the slightest failure in his duty towards them—it hands him over to be stoned."[132] Weyl has already brought to our attention that the law of the "rebellious son" in the *Antiquities* is not in agreement with the discussion of the same law in *Contra Apionem*.[133] Ritter has even shown a verbal agreement between the discussion of the same law in *Specialibus Legibus* and *Contra Apionem*.[134] Both say that if a child does anything to put his parents in an unfavorable light he is executed by stoning, while the Bible does not specify the mode of the execution. It is no coincidence that

[130] See Heinemann, *Philons griechische und jüdische Bildung*, p. 309; see also Mitteis, *Grundzuge der Papyruskunde*, 11, 248 and the other references made by Heinemann.

[131] See Goodenough, *Jewish Courts in Egypt*, p. 92 and his reference to E. Revillout, *Precis du droit Egyptien compare aux autres droits de l'antiquité* pp. 1096 ff. see also E. Revillout, *Cours du droit Egyptien*' pp. 196 ff.

[132] *Contra Apionem* II, 27 (206).

[133] *Strafgesetze bei Flavius Josephus*, pp. 39 ff.

[134] *Philo und die Halacha* p. 41, n. 6.

both apply the same penalty, but it hardly proves the dependency of Josephus on Philo. The fact, however, that in *Contra Apionem* Josephus applies the biblical law even in case a child is not responding to benefits received, shows that he borrowed this idea from the *Hypothetica*. In the apologetic treatise Philo writes: "If you commit any act of impiety not only through your deeds, but also by any chance of word to your father (εἰς πατέρα) or to your mother (ἢ μητέρα) or to one from whom you derive benefits (ἢ ευεργέτην) death is equally the penalty" (θάνατος ὁμοίως).[135] In the *Hypothetica* Philo applies the biblical law not only to parents, but also to anyone from whom one derives benefits. Thus according to Philo if one utters a disgraceful word to his benefactors or to his parents he is punished by death because he does not respond to the benefits received from them. Such a law has no origin in Palestinian jurisprudence. The passage in *Contra Apionem* which reflects also the same idea could have been based only on Alexandrian source. In another place Philo says that the parents have ownership (δεσποτείας) over their children because the latter derive benefits from their parents.[136] Whether or not Philo based this principle on Roman law is of no interest to us, but I am convinced that it is a mistake to assume that the Alexandrian Jews have accepted whole-heartedly the Roman doctrine of *patria potestas*[137] and as Philo himself says "by the law of the Romans the father has unlimited power over his son."[138] It is true that Philo calls children natural slaves of their parents (φύσει δοῦλος)[139] and Prof. Goodenough finds some striking parallels to the same idea in Roman literature.[140] It is interesting

[135] *Fragmenta* 628.
[136] *Spec. Leg.*, II, 233.
[137] This view is held by Cohn, Heinemann, and Goodenough.
[138] *Ad. Gaium*, 28.
[139] *Posteritate Caini*, 109.
[140] *Jewish Courts in Egypt*, pp. 70 ff.

to note, however, that in the *Hypothetica* Philo includes among the capital offenses the enslaving of offspring by parent (*γένημα δοῦλουν*).[141] Philo calls a child *δοῦλος* only in as far as obedience to parents is concerned. but unlike the Roman law, he does not grant the parents unlimited authority over their children, and in order to show the difference between the Jewish and Roman conception of the parent's authority over their children, Philo says that according to Jewish law the parents may govern their children only for the latter's preservation and benefit (*γονεῖς παίδων ἄρχειν ἐπὶ σωτηρίᾳ πολυωρίᾳ*).[142] If, however, the children act or speak disgracefully to those from whom they received benefits Philo favors the severity of Roman law instead of the Palestinian law which was extremely lenient in such cases.

Intention

In *Contra Apionem* Josephus goes one step further in saying that the mere intention of doing wrong to one's parents, the penalty is death (*περὶ μὲν γὰρ γνοέων ἀδικίας κἂν μελλήσῃ τις, εὐθὺς ἀπόλυται*).[143] Weyl has already noticed that this statement in Josephus which required the death penalty for mere intention to do evil to parents is the climax of the severe penalties which Josephus enumerates in *Contra Apionem* and there is no parallel to this law in the Halakah. In the *Ant.* Josephus says that no one can be punished for planning to commit a crime.[144] Thus the passage in the *Ant.* contradicts the passage in *Contra Apionem.* The question naturally arises on what source has Josephus based this law?

[141] *Fragmenta*, 580.
[142] *Fragmenta*, 626.
[143] *Contra Apionem* II, 29 (217).
[144] *Ant.*, XII, 358.

In order to understand the passage in *Contra Apionem* we must first bear in mind that there really was a disagreement between the Palestinian and Alexandrian Jews with reference to intention in criminal cases. In early tannaitic sources we find a disagreement as to whether or not there can be any agency for criminal acts. Shammai the elder says that if one directs a crime though the act of murder was performed by another party, the one who planned the murder bears responsibility, while the accepted Halakah is that only the one who actually committed murder is responsible.[145] The Talmud says that the disagreement between Shammai the elder and the other tannaitic scholars was whether or not one can make an agent for an illegal act. It may be doubted, however, whether the view held by Shammai had anything to do with the law of agency. Shammai was only of the opinion that one who instigates or plans a murderous act is also a murderer though the act is committed by someone else. The view of Shammai that there is no difference between one who actually kills and the one who brings death by his intention and planning was the accepted Roman[146] and Greek law.[147] On the accepted Halakah that planning or instigating does not constitute murder many new laws were derived. Thus if one binds a man and leaves him before a wild beast he is not punished for murder, since he did not perform the actual killing, though he directed the crime.[148] Again if a number of people simultaneously kill a person none of them can be

[145] Ḳid. 42a.

[146] See Mommsen, *Strafrecht* pp. 626 ff; see also I. Levinthal *The Jewish Law of Agency*, pp. 49 ff.

[147] See Cohn's note on *Spec. Leg.* 86 who quotes Andocides, I, 94 "the one who plans a murder shall be punished as one who does it with his own hands" (*τὸν βουλεύσατα ἐν τῷ αὐτῷ ἐνεχέσθαι καὶ τὸν τῇ χειρὶ ἐργασάμενον*).

[148] Sanh. 77a.

punished by death.[149] Everyone may be considered a murderer in his intent, but not in the actual killing since the act of murder was not committed by one.

Philo does not follow the accepted tannaitic Halakah, but like Shammai, he is also of the opinion that the one who directs a crime is also a murderer. Philo makes a three-fold distinction of murder: intentional murder (*φόνος ἑκούσιος*); unintentional murder (*φόνος ἀκούσιος*); and murder of *βούλευσις* which means the instigating of murder which was actually carried out by some one else.[150] In the *Specialibus Legibus* Philo goes even further in saying: "If anyone aims a blow with a sword at anyone with the intention of killing him and does not kill him, he will still be guilty of murder, since he was a murderer in his intention."[151] Here again Philo says that if one intends to commit murder though he actually did not fulfill the crime he is also a murderer. This law is found verbatim in *Legum Collatis* who quotes Paulus: "Qui hominem occidit, aliquando absoluitur et qui non occidit, ut homicida damatur: consilium enim uninscuius que, non factum puniendum est. ideoque si qum uellet occidere, cosu aliquo prepetrate non potuit ut homicidia punitur: et si, qui casu teli hominem inprudenter ferierit absoluitur."[152] Philo, however, does not say that for intention one is punished by death. It may be that Philo only claims that from the moral point of view if one intends to commit murder he is also guilty of

[149] B. K. 10b. The Karaites, who are of the opinion that indirect murder is also a capital crime punished by death do not accept the Halakah under discussion (see Revel, *Karaite Halakah*, (1913), p. 52.

[150] *De Fuga* 53. Some Mss. read *τὸ ἐπιθέσεως, το βουλήσεως* which would be a fourfold classification of murder, and this is the text which Goodenough prefers, while Wendland, Heinemann, and Colson favor the reading *τὸ ἐπιθέσεως τε καὶ βουλεύσεως* which includes the two into a single head.

[151] *Spec. Leg.*, III, 86.

[152] *Call.* I, 1–2.

homicide. A parallel to the view held by Philo is only found in Mishnath R. Eliezer: מחשבה שיש עמה מעשה הרי הוא כמעשה. כיצד? נטל את כלי זינו ויצא ולא השיג חבירו זו מחשבה שיש עמה מעשה מעלין עליו כאילו הרגו.[153]

We are not interested, however, in this paper in the sources on which Philo based his discussion of Mosaic law. This problem we will discuss in a separate work which will deal with the relation of Philo to the Oral law. We may say, however, with certainty that the planning or instigating, or intending to commit a crime was considered a greater offense among the Alexandrian Jews than among the Palestinian Jews. Thus in the *Antiquities* when Josephus follows Palestinian traditions he says that there is no penalty for planning a criminal act while in *Contra Apionem* where he follows Alexandrian traditions he states that for the mere intention of doing wrong to one's parents is as serious a crime as having fulfilled the act. Josephus speaks here about intending to do harm to parent as a more striking example, but the same law would be applied in case one will plan to do harm to any person. As we have said before, it is highly improbable that the Alexandrian Jews penalized one by death for the intention to commit murder, but since the Alexandrian Jews spoke of the intention to commit murder as serious a crime as if it had been actually committed, for apologetic purpose Josephus could easily say that for such a crime one is punished by death.

The more severe attitude of the Alexandrian Jews towards intention in criminal acts is also reflected in another passage in Philo. The law in Ex. 22, 18 which requires an oath from the depositary that he has "not put his hand in his neighbor's good" if he claims that the deposit was stolen. Philo makes the following comment on this law: "And if they (the

[153] Mishnath R. Eliezer ed. Enelow (1933) p. 163.

thieves) are not taken, then the man who received the deposit shall go of his own accord before the divine tribunal, and stretching out his hands to heaven shall swear by his own life that he had no intention to appropriate that what has been deposited with him" (*μη τε ἰμέρω τῆς παρακαταθήκης νόσφίσασθαι*).[154] Here again Philo is of the opinion that the mere intention of committing a criminal act makes one responsible as if he had committed the crime. Thus according to Philo if the depositary only contemplated to appropriate the deposit, even if it was lost or stolen later in manner which he cannot be blamed he must restore all that he received in trust, because before the deposit was lost he intended to appropriate it. Josephus, however, says: "But if, without any act of treachery, the depositary lost the deposit, let him come before the seven judges and swear by God that nothing has been lost through his own intentions or malice, and that he had not appropriated any part of it to his own use, so let him depart exempt from the blame. But if he used but the smallest portion of the trust and happens to have lost the remainder, he shall be sentenced to restore all that he received."[155] According to Josephus the depositary is liable to pay for the deposit only if he actually made use of it. There is no doubt that in the *Ant.* Josephus follows the accepted Palestinian Halakah that no one can be punished for the mere intention of committing a criminal act. It is, however, interesting to note that the question as to whether or not the depositary can be punished for intention was also a matter of dispute between the Shammaites and the Hillelites.[156] The former who seem to have followed the footsteps of Shammai the elder, who was of the opinion that planning or instigating

[154] *Spec. Leg.*, IV, 34.
[155] *Ant.*, IV, 8, 38.
[156] B. M. 3, 12.

a crime is as great an offense as having committing it, are, like Philo, of the opinion that the mere intention of making use of a deposit makes one responsible to restore what has been received in trust, though it was stolen or lost (החושב לשלוח יד בפקדון חייב).[157] The Hillelites, like Josephus considered the depositary responsible for the whole deposit only if he had made use of a part and performed an act by which he showed that his intention was to appropriate the whole, but for mere intention to steal a person cannot be made responsible. Thus in the *Ant.* Josephus follows the accepted Palestinian Halakah, while Philo, like the Shammaites, constantly emphasizes the great offense of contemplating to commit a criminal act. In *Contra Apionem* Josephus also follows the view held by Philo.

The Sabbath as a Universal Proclamation

One of the differences between Alexandrian and Palestinian Jews was with reference to the Sabbath. The Palestinian Jews considered the Sabbath a special gift bestowed only upon the Jews.[158] The Sabbath signified the covenant between God and Israel. This view is already echoed in the Book of Jubilees: "The Creator of all things did not sanctify all peoples and nations to keep the Sabbath on it, but Israel alone; them alone did he permit to eat and drink and to keep the Sabbath on it on earth."[159] The Sabbath is pictured in rabbinic literature as a bride to Israel, and when a pagan observes the Sabbath it is equivalent to adultery.[160] One of the Rabbis went even to the extreme of saying that a pagan who observes the Sabbath is guilty

[157] Ibid.
[158] Shab. 11b.
[159] Jubilees 2, 31.
[160] Genesis R. 11, see also Finkelstein, "Book of Jubilees and Halakah," *Harvard Theological Review* (1923), p. 47.

of death.[161] This saying, of course, should not be taken literally. It only shows that the Rabbis considered the Sabbath deeply rooted in Jewish life and Judaism. The Sabbath is never included among the seven commandments which must be universally fulfilled. Treitel has accurately remarked that in Philo the Sabbath appears as a universal proclamation and Philo himself takes pride in the fact that the Sabbath is observed even among the heathen. In *Vita Mosis* when Philo endeavors to show the divine origin of Mosaic law he says: "There is something surely still more valuable—even this: not only Jews but almost every other people, particularly those which take more account of virtue, have so far grown in holiness as to value and honor our laws . . . . They attract and win the attention of all, of barbarians, of Greeks, of the dwellers in the west, of Europe and Asia, of the whole inherited world from end to end. For who has not shown his high respect for that sacred seventh day, by giving rest and relaxation from labor to himself and his neighbors, freemen and slaves alike, and beyond these to his beasts? Again who, does not show awe and reverence for the fast, as it is called which is kept more strictly and solemnly than the "holy month" of the Greeks?"[162] Philo goes on comparing the Jewish and pagan conception of a holiday. The whole passage which we did not quote at length shows Philo at his best as an apologist and at the same time as a propagandist,[163] and the Sabbath and the Day of Atonement he chose as evidence that Jewish law has a universal value. This apologetic passage of Philo

[161] Sanh. 58b.

[162] *Vita Mosis*, II, 17–23.

[163] *De Vita Mosis* certainly apologetic in character, but it was not written for the sake of refuting definite accusations against the Jews. In this respect *De Vita Mosis* differs from the *Hypothetica*. See also Goodenough, "Philo's Exposition of the Law" *Harvard Theological Review* (1933), pp. 109–25.

is found verbatim in *Contra Apionem*. Josephus, like Philo endeavors to show that pagan laws are kept by some and rejected by others, the law of Moses remains ἀθάνατος.[164] The same term is also used by Philo[165] and the nature of the argument is the same. It would take too much space to quote the whole passage in Philo and Josephus, but they are so much alike that their common origin cannot be doubted. We shall merely quote the passage which deals with the Sabbath and Day of Atonement: "It will be found that throughout the whole of that period not merely have our laws stood the test of our own use, but they have to an ever increasing extent excited the emulation of the world at large . . . All masses have long since shown a keen desire to adopt our religious observances; and there is not one city, Greek or barbarian, nor a single nation, to which our custom of abstaining from work on the seventh day has not spread, and where the fasts and the lighting of lamps and many of our prohibitions in the matter of food are not observed.[166] Josephus also claims for apologetic purposes that the Sabbath and the Day of Atonement are universally accepted and the passage in *Contra Apionem* is based on the apologetic sources of Philo.

Josephus in *Contra Apionem* not only compares Jewish law with the law of the Gentile world, but he also defines how Moses differed as a legislator from other lawgivers. He says that Moses combined theory and practice: "All legislators, differing in their opinions, selected the particular method which each preferred and neglected the other. Thus the Lacedaemonians and Cretans employed practical, not verbal, training, whereas the Athenians and nearly all the rest of the Greeks made laws enjoining what actions might

[164] *Contra Apionem*, II, 38 (277).
[165] *Vita Mosis*, II, 14.
[166] *Contra Apionem*, II, 39 (280–83).

or might not be performed, but neglected to familiarize the people with them by putting them into practice. Our legistator, on the other hand, took great care to combine both systems. He did not leave practical training in morals inarticulated; nor did he permit the letter of the law to remain inoperative."[167] It is interesting to note that Philo introduces his work by eulogizing Moses who combined both systems, the practical and theoretical. "While among other lawgivers some have nakedly and without embellishment drawn up a code of the things held to be right among their people, and others dressing up their ideas in much irrelevant and cumbersome matter, have befogged the masses and hidden the truth under the fictions, Moses disdaining either course, the one as devoided of the philosopher's painstaking effort to explore his subject thoroughly, the other as full of falsehood and imposture, introducing his laws with an admirable and most impressive exordium. He refrained, on one hand, from stating abruptly what should be practiced or avoided, and on the other hand, in the face of the necessity of preparing the minds of those who were to live under the laws for their reception, he refrained from inventing myths himself or acquiescing in those composed by others."[168]

The Priestly Character of Jewish Law

One of Apion's accusations against the Jews was that they have not produced any geniuses such as inventors in arts and crafts or eminent sages.[169] The same reproach was also leveled against the Jews by Apollonius Molon. Josephus refutes this accusation by claiming that the nature of the Jewish constitution does not require any men of genius, because

[167] *Contra Apionem*, II, 17–18 (176–78).
[168] *Opificio Mundi*, 1–3.
[169] *Contra Apionem*, II, 12 (135).

the Jewish constitution is not in any need of amendments. The Law is the revealed word of God and the Jews are in no need of any new discoveries. The orthodox belief of the Jews in the divine origin of the Law makes controversies in matters related to God and human conduct a rare occurrence. The Jews live according to the authority of the Law and therefore, there is no place for dissenting opinions and philosophical speculation.[170] Since Jewish law is not secular in character, therefore, the legislators themselves must be priests who are the servants of God: "Could there be a finer or more equitable polity than one which sets God at the head of the universe, which assigns the administration of its highest affairs to the whole body of priests, and entrusts to the supreme high-priest the direction of the other priests? These men, moreover, owed their original promotion by the legislator to their high office, not to any superiority in wealth or other accidental advantages . . . But this charge further embraces a strict superintendence of the Law and of the pursuits of everyday life; for he appointed the duties of the priests including general supervision, the trial of cases of litigation (*δικασταὶ τῶν ἀμφισβητουμένων*), and the punishment of condemned persons" (*καὶ κολασταὶ τῶν κατεγνωσμένων*).[171] Josephus seems to hint that the members of the Jewish courts are only priests and the whole character of the Jewish legislation is not secular. Some passages in the *Ant.* imply that Josephus considered the High Priest the head of the Sanhedrin, but Josephus never mentioned that the members of the Jewish courts must be priests. About the local courts Josephus says in the *Ant.*: "As rulers let each city have seven men long exercised in virtue and in pursuit of justice; and to each magistracy let there be assigned to subordinate officers of the tribe of

[170] *Contra Apionem*, II, 19–20 (177–183).
[171] *Contra Apionem*, II, 21 (184–87).

Levi."[172] Here Josephus does not stipulate that the judges must be priests. Josephus' statement that the subordinates must be from the tribe of Levi is in agreement with tannaitic Halakah.[173] According to the Halakah even in capital trials the court must not consist entirely of priests. Priests, Levites, and Israelites that may give their daughters in marriage to priestly stock are qualified to try capital cases.[174] It is interesting to note, however, that in Philo the Sanhedrin in Jerusalem is always pictured as consisting only of a body of priests: Οὗτοι δέ τίνες ἄν εἶεν, ἢ ἱερεῖς καὶ ὁ τῶν ἱερέων ἔξαρχος καὶ ἡλεμών?[175] It seems that the hellenistic Jews were used to speaking about the Jewish legislation as a part of their religion and therefore they also claimed that the Jewish courts consist of priests. The most significant part of Josephus' argument that the Jewish constitution is not secular in character but religious is that at the end of his discussion he comes to the conclusion that Judaism itself is also a mystery religion: "Could there be a more saintly government than that? Could God be more worthily honored than by such a scheme, under which religion is the end and aim of the training of the entire community, the priests are entrusted with the special charge of it, and the whole administration of the state resembles some rite of initiation? (ὥσπερ δὲ τελετῆς τινος τῆς ὅλης πολιτείας οἰκονομουμένης.[176] Practices which, under the name of mysteries and rites of initiation, other nations are unable to observe but for a few days, we maintain with delight and unflinching determination all our lives." The whole conception of Josephus is that the Jewish

[172] *Ant.* IV, 8, 14.

[173] Sifre Deut. 15; see also 144; Ginzberg, *Eine unbekannte jüdische Sekte*, p. 69.

[174] Sanh. 4, 2.

[175] *Spec. Leg.*, IV, 190.

[176] *Contra Apionem*, II, 22 (188–89).

government and constitution resembles the mystery religion and rites of initiation although it is unlike the pagan mysteries. Such an idea is entirely foreign to Palestinian normative Judaism, but the conception of Judaism as a mystery is found in Philo. For apologetic purposes such a conception of Judaism was very useful. First it showed that Judaism is not as inconceivable as the cultured pagan world thought it was; secondly it gave the apologists a chance to show the superiority of the Jewish constitution and religion.

Conclusion

The evidence discussed indicates clearly that in *Contra Apionem*, II, Josephus is either directly dependent on the *Hypothetica* of Philo or on one of its sources, more probably the former. Eusebius has not preserved for us the whole *Hypothetica*, and *Contra Apionem* comprises a great part of extant Alexandrian apologetic literature. It would be vain to endeavor to reconcile *Contra Apionem*, II, with the *Antiquities* and *Wars* of Josephus as it would be equally hopeless to attempt to harmonize the *De Specialibus Legibus* with the *Hypothetica*. Philo the practical lawyer and Philo the apologist, Josephus the Palestinian Jew and Josephus dependent upon Alexandrian apologetic sources, must be carefully distinguished. The *Antiquities* and *Contra Apionem*, II, belong to two different civilizations and were written for two different purposes, and, therefore, must be treated separately and independently. There were some differences between the Alexandrian and Palestinian Jewish constitutions, and *Contra Apionem* took over some Alexandrian law. As apologists, the Alexandrian Jews spoke of the violation of biblical prohibitions as capital offenses. Philo refers in the *Hypothetica* to violations of minor laws as offenses to be punished by the curse of God. The Jew,

unlike the pagan, considered every national custom and law as the revealed word of God, so that whoever violated any of the commandments violated the word of God.[177] Hence from the ideal view point the Jews could speak of the violation of every commandment as a capital offense. When Alexandrian Jews wrote apologetic literature they expressed their idealism for the Law. In practical life, however, distinctions were made between more solemn and less solemn commandments and customs.[178]

[177] Josephus himself makes this distinction between Greek and Jewish law. In *Contra Apionem*, I, 8 (42–45) he writes: "We have given practical proof of our reverence for our Scriptures. For although such long ages have now passed, no one has ventured either to add or to remove, or to alter a syllable; and it is an instinct with every Jew, from the day of his birth, to regard them as the decrees of God, to abide by them. Time and again ere now the sight has been witnessed of prisoners enduring tortures and death in every form in the theatres, rather than utter a single word against the laws and allied documents. What Greek would endure as much for the same cause? Even to save the entire collection of his nation's writings from destruction he would not face the smallest personal injury. For to the Greeks they are mere stories improvised according to the fancy of their authors." In our modern age we classify codes which apply severe penalties for minor offenses as primitive. In the ancient world, however, the nation which applied severe penalties for the violation of its constitutional law was considered superior to those nations who were lenient in punishments. Thus apologists like Josephus and Philo endeavored to show the ethical value of the Jewish constitution by the infliction of severe penalties against offenders of the law.

[178] A similar approach to that of Philo and Josephus is also found in rabbinic literature. The Talmud relates that a Gentile once asked R. Johanan b. Zakkai, a contemporary of Josephus, the reason for the biblical law that if a ferocious bull killed a man after warning has been given to the owner, the latter also suffers the penalty of death (Ex. 21.29). R. Johanan b. Zakkai answered that one who shares with a robber is equal to a robber (שותף ליסטים כליסטים), but his disciples he told that the owner of the beast does not suffer death, but the beast is put to death in the same manner as the owner—that is by court. (כמיתת הבעלים כך מיתת השור) (Jer. Tal. Sanh. 19b). An an apologist R. Johanan b. Zakkai was willing to take the biblical text literally, but when he defined the law to his disciples he modified the law in order that it might be applied for actual usage.

In this approach to apologetic literature Josephus also followed the *Hypothetica*. We can practically say that there is very little new and original in *Contra Apionem*, II, of Josephus, since apologetic Greek sources by Philo and others were in existence previously. Josephus' contribution was merely to give the material a popular expression by the clarity of his style.

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